In The

Supreme Court of the United States

October Term, 1923.

Original No. 25.

STATE OF MICHIGAN, *Plaintiff*, v. STATE OF WISCONSIN, *Defendant*.	}	In Equity.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THIS ACTION.

ANDREW B. DOUGHERTY,
Attorney General,
A. L. SAWYER,
Special Counsel,
Attorneys for Plaintiff.

Mich. Brief & Record Co., 4429 Field Ave., Detroit, Mich.

Gift
Mr. M. P. Sawyer
10-27-1931

TOPICAL INDEX.

	Page
Reasons why motion should be dismissed	1
STATEMENT OF FACTS	3
Michigan's admission into the Union	3
Boundaries between State of Michigan and Territory of Wisconsin identical	3
Preliminary situation	4
Comments on Burr map of 1836	5
Description of boundary in Michigan grant	6
Remarks on Tanner map of 1830	6
Comparisons of boundaries	6
Provision for survey of Michigan line	7
Instructions to Captain Cram	7
Survey was made in reverse order of description.	8
Cram expected to find Lac Vieux Desert as head of Montreal River	9
Cram decided line described in Michigan Act was an impossible line	9, 13, 16
Cram reported his interpretation of understanding of Congress	9
Cram erred in his report	10
Judson map printed by Wisconsin, incorrect	10
Misrepresentation as to Lac Vieux Desert	11, 27
Cram reports Michigan description of boundary cannot be complied with	12
Cram makes erroneous map (Exhibit B) from hearsay	12
Cram says it is not presumable line (now claimed by Wisconsin) was intended by Congress as a part of boundary	14, 26
Cram's erroneous constructions	15
A portion of Michigan's boundary never surveyed	16

Cram's misrepresentations a public record..... 16, 20
Cram's recommendations, as to Montreal section.... 17
Cram's recommendations, as to Menominee R. Section 18, 29
Cram's recommendations, as to Green Bay Section.. 19, 30
Michigan asks U. S. to join in commission to locate boundary 20
Congress refused but ordered survey and map of the country to aid in locating line..... 21
Directions for this survey 22
Cram's report of second survey erroneous....22, 28, 34, 37
Cram's report as to Montreal River..... 23
Cram's arbitrarily, marked wrong head of Montreal 24
Cram did not report West Branch or Main Channel of Montreal 25
Cram says further surveys are necessary..... 31
Bill to amend Michigan's boundary failed..... 31
Change in Michigan boundary refused by Congress. 31, 33
Boundaries the same in description through Green Bay 32
Wisconsin's claimed boundary in Menominee and Brule Rivers 32
Wisconsin knew she had no grant of any land within Michigan's boundaries 34
Michigan did not ratify Wisconsin's proposed boundary 34
Cram's suggested amendment to boundaries included West Branch of Montreal River as the right-hand channel 35
Country was a wilderness 37
Michigan's Constitution of 1850 ..... 39- 40
Michigan's Constitutional Convention of 1867..... 41
Cannon's first discovery of error in boundary..... 43
Michigan first informed in 1907 43
Michigan sought amicable adjustment with Wisconsin in 1908. Refused 43
Michigan Legislature directed action by Atty. Gen. and investigation started in 1908 44

Michigan's Constitutional Convention of 1908 reasserted her boundaries 44
The Burt survey was of Wisconsin's conditional boundary 46
Wisconsin's description of boundary in her Constitution 47
Michigan's boundary could have been laid down—
Montreal River section 48
Menominee River section 49
Green Bay section 49
Michigan again sought amicable adjustment with Wisconsin in 1921 50

ARGUMENT 51

Sectional analysis of allegations of complainant.... 51
Defendant's claims as to use of public documents.. 53
Defendant's reasons for dismissal of case..... 54
"Acquiescence" as a reason..... 55
Defendant's statement as to law involved..... 55
Plaintiff's statement as to law involved..... 56
Laches, prescription, etc. 64
Review of facts as to acquiescence and laches..... 101
Michigan had the right to be at ease..... 106
Michigan's constitution of 1850 109
Constitutional Convention of 1867..... 111
First discovery of mistake of Capt. Cram..... 111
Constitutional Convention of 1908..... 113
Michigan's boundary commission..... 114
Comments on documents cited and errors found in Defendant's brief 116
Defendant's attempt to show ambiguity in boundary 117
Wisconsin's Enabling Act 121
Defendant's comments on 1908 Convention..... 121
Defendant's analysis of Michigan's claims..... 123
Defendant's discussion of Michigan's claims..... 124
Congress did not consider boundary temporary.... 126
Defendant's claims as to present boundary being in accord with Michigan's grant 126-127

Defendant's claims that Michigan officials had notice 127
Dr. Houghton did not accompany Capt. Cram..... 128
Defendant's claims that discrepancies pointed out defeat the complaint 132
Defendant's discussion of remedy by motion; scope of judicial notice 132-133
Wisconsin's claim of sovereignty 134
Defendant's claim that Wisconsin's boundary has been recognized 135
Defendant's claim of recognition by U. S..... 135
U. S. land survey 137
Other official surveys and claimed acts of recognition 137
Defendant claims lighthouse indicates channel..... 137
Defendant claims Wisconsin has had uninterrupted sovereignty 138
Defendant's topics of geological surveys..... 139
Defendant's claims as to Wisconsin elections..... 139
Defendant's claims as to Michigan's organization of counties, etc. 140
Defendant's claim that the grant to Michigan does not antedate that to Wisconsin..... 140
Ordinance of 1787 141

Table of Cases.

Arkansas v. Tennessee, 246 U. S., 158, 174..... 66, 86
Boyd v. Graves, 4 Wheat., 513..... 66, 72
Belding v. Hebard, 103 Fed., 532..... 66, 83
Commonwealth v. First Presbyterian Church, 8 Ohio S. C., 298 ..... 65, 66
Commonwealth v. McGowan, 7 Am. Dec., 739..... 68
French v. Commonwealth, 27 Am. Dec., 615..... 68
Gibson v. Chouteau, 13 Wallace, 90..... 65, 68
Hoey v. Furman, 44 Am. Dec., 124..... 68
Indiana v. Kentucky, 136 U. S., 479.....66, 69, 73

Jourdan v. Landry, 4 Howard, 169..... 65, 68
Lindsay v. Miller, 6 Peters, 666 (Book 8 L. Ed., 538) 65, 66
Lott v. Brewer, 64 Ala., 287..... 66, 97
Louisiana v. Mississippi, 202 U. S., p. 1..... 66, 69
Mathews v. Murchison, 17 Fed., 760, 766..... 59, 61
Marine Railway & Coal Co. v. U. S., 66 L. Ed., 55, Nov. 7, 1921 ..... 66, 96
Mayor of Kingston v. Horner, Cowper p. 102..... 66, 101
Missouri v. Kentucky, 11 Walace, 395..... 66, 71
Maryland v. W. Va., 217 U. S., 41..... 66, 86
Moore & McPherson v. McGuire, 142 Fed., 786...66, 85, 90
N. Carolina v. Tennessee, 235 U. S., 1..... 66, 84
Nimo v. Commonwealth, 7 Am. Dec., 488..... 68
Oaksmith v. Johnson, 92 U. S., 343..... 65, 69
Oklahoma v. Texas, 41 Sup. Ct. Rep., 420..... 65, 96, 121
Pence v. Langdon, 99 U. S., 578, 581 (25 L. Ed., 420) 59, 61
Pearson v. Arlege, 23 Am. Dec., 145 ..... 65, 68
Polaski County v. State, 42 Ark., 118..... 66, 97
Royce v. Carpenter, 80 Vt., 37 (66 Atl., 888, 892)... 59, 63
Rice v. Minn. & N. W. R. Co., 66 U. S., 358, 380.. 66, 101
Rhode Island v. Massachusetts, 4 Howard, 591.... 66, 73
Richards v. Williams, 7 Wheat., 59..... 101
U. S. v. Hoar, 2 Mason, 311..... 67, 68
U. S. v. Texas, 162 U. S., 867.....65, 91, 12
U. S. v. Stone, 2 Wallace, 525..... 66, 73
Stein v. Bienville Water Power Co., 141 U. S., 67.... 66, 101
Stephenson v. Fain, 116 Fed., 147, 155..... 66, 85
Sanders v. Commonwealth, 10 Grat., 496..... 68
Sevasser v. Washburn, 11 Grat., 577..... 68
Virginia v. Tennessee, 148 U. S., 503.....66, 69, 72, 90
Wagg v. Herbert, 12 Poc., 250, 266 (99 Okla., 525).. 59, 63

Texts.

Am. & Eng. Enc. of Law, Vol. 1, page 570.....	59, 60
Corpus Juris, Vol. 1, page 1.....	58
Raph & Lawrence's Law Dic.....	58
Vattel's Law of Nations, Book 2, C. 11, Sec. 149....	90, 98
Wheaton's International Law, Part 2, C. 4, Sec. 164..	90, 100
Words and Phrases, Vol. 1, page 110.....	58
Words and Phrases, Second Series, Vol. 1, page 63..	59, 64

In The

Supreme Court of the United States

October Term, 1923.

Original No. 25.

STATE OF MICHIGAN, *Plaintiff,* v. STATE OF WISCONSIN, *Defendant.*	In Equity.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THIS ACTION.

The plaintiff, defending against said motion, asks that same be dismissed:

First. Because it is apparent from the bill of complaint and the motion taken together and the affidavit filed in opposition to said motion, that the issue sought to be disposed of under said motion, is one that cannot be fairly tried under the rules of practice governing proceedings upon motion.

Second. Because it does not appear, as claimed by defendant, that public documents therein referred to *conclusively* contradict essential allegations of the bill, and it does not appear that public documents of which the court can take judicial notice, constitute all the evidence that may be furnished in support of the bill, or that the public documents referred to are all the documents of that nature bearing upon such issues, and it does appear that there is much other evidence which plaintiff desires to produce, important to the issue raised by said motion, which cannot properly or conveniently be presented on a hearing of said motion, but can be presented at a hearing in the regular course of practice of hearings upon pleadings.

Third. Because the bill of complaint does set forth a cause of action, on which plaintiff is entitled to submit proofs, and there is no showing that all the evidence on any essential feature of the bill is before the court.

Under the heading of "Issues Presented by Motion" at the beginning of defendant's brief, there is an attempt at stating the plaintiff's theory of the case, which is far from a correct statement of our theory. It is not our theory that there is any ambiguity or uncertainty in the description of the boundary in the act of cession to Michigan, as must be inferred from the statement referred to in defendant's brief, but there are portions thereof which require establishment in places by engineering proofs, and in other places by other proofs.

PLAINTIFF'S CASE.

While we take it that the only issue before the court is the question as to whether or not the bill of complaint, or the complaint as either modified by the use of such public documents as are *conclusive* upon any essential allegation of the complaint, states a cause of action, the entire complaint together with the documents referred to must be considered to determine this question, and as a consequence this brief must be quite lengthy, and involves quite a full presentation of

STATEMENT OF FACTS PRESENTED.

Michigan was admitted into the Union January 26th, 1837, with boundaries as described in the Act of June 15, 1836, which conditionally provided for such admission and for the adjustment of the boundary dispute that had long existed between Michigan and Ohio. The territory included within those boundaries was only a part of what had been Michigan Territory. Shortly before, and on the 20th day of April, 1836, Congress created the Territory of Wisconsin entirely from other portions of what had been included in Michigan Territory. The boundary between the state of Michigan and the Territory of Wisconsin, along the line now in dispute, was identical in the two acts, although described in the reverse order in one from that in the other, and with a slight and immaterial variance in the wording as to that portion extending through Green Bay.

At that time the country traversed by most of the boundary in question and especially that of the Montreal river section was an entire wilderness, very hard of access and almost wholly unknown.

Michigan's efforts to be admitted as a state had been unsuccessful for a period of years, largely because of a long-

standing controversy with Ohio over Michigan's southern boundary. In 1834, it was tentatively agreed by the Judiciary Committee of the Senate, to grant Ohio's claim and to compensate Michigan by extending her northwestern boundary across the lakes. At that time the Committee had before it an erroneous map which showed the Menominee and Montreal Rivers both with a common source in a large lake called Lac Vieux Desert, thus forming a continuous waterway from Lake Superior to Green Bay of Lake Michigan. The course of those rivers was then tentatively agreed upon as a proper boundary.

Between that time and April 20th, 1836, it had been learned by Congress that there was no such continuous waterway, but that there were numerous lakes in that region called "Les Lac Vieux Desert," translated sometimes, improperly, "Lakes of the Desert," one of which was connected with the main channel of the Montreal River, one of which was at the head of that branch of the Menominee which appeared upon a map to come nearest to the Montreal, and one at the head of each the Ontonagon, Wisconsin, and Chippewa Rivers (Complaint, Exhibit A).

This map, which is found in the Library of Congress and is referred to as a part of the Bill of Complaint shows upon its face that it was made in 1836 by David H. Burr, draughtsman to the House of Representatives. By it, it appears that Congress knew the general and comparative location, though not the exact location of these lakes and they were able, with this information, to describe a boundary that could have been, and they did describe a boundary that could and should have been laid down in the field. By this map we are further informed, by the appearance of the heavy black lines, some of which mark Indian boundaries, and one of which marks the boundaries of Carvers' grant, that by still another Congress indicated its understanding and intent as to the location of most of the boundary now in question by the use of the heavy black line which, starting at the mouth of Montreal River, Lake Superior, follows up that river to a lake shown on that map as located at

its head, thence continuing its southeasterly course to a lake at the head of the River Menominee or a branch thereof, and that line left on its northerly side a lake taking the place, substantially, of the lake now known as Lake Gogebic, and the lake now known as Lac Vieux Desert, and had directly in its course the lake at the head of the main channel of the Montreal now known as Island Lake and the lake at the head of the branch of the Menominee, now known as Brule Lake, with two lakes to the south thereof. That map further shows by the plural form in French, printed clear across from the Lake at the head of the Montreal to that at the head of the Menominee, "Les Lac Vieux Desert" (the lakes of the old, or deserted, place). Then translated on another map as "Lakes of the Desert." Besides this the Bill alleges that they, with a large number of other lakes in that vicinity were then known as "The lakes of the Desert" (Complaint, p. 4).

In this situation the final Bills were presented to and passed by Congress creating Wisconsin Territory and providing for the admission of Michigan into the Union, in each of which the land portion of the boundary in question was described in such a way as to accord with the showing made by that map (the Burr Map of 1836), and not to accord with the earlier map which was used by the Judiciary Committee in 1834, and which showed the continuous water boundary.

That description, as found in the Act of June 15th, 1836, can be easily traced by following the heavy black line placed on said Burr map to indicate said boundary, and in said map may be found material objects to accord with every feature of that description. Said portion of said boundary is described in said act, from the mouth of the Montreal River, as follows:

> "Thence through the middle of the main channel of said River Montreal, to the middle of the Lake of the Desert; thence in a direct line to the nearest head waters of the Menominee River; thence through the

> middle of that fork of said river first touched by said line, to the main channel of said Menominee River; thence down the center of the main channel of the same, to the center of the most usual ship channel of Green Bay of Lake Michigan."

In 1838, the Legislative Assembly of "Wiskonsan" Territory caused to be published a map (Complaint Exhibit B) called the Judson map and which is alleged to have been similar to the one referred to as having been had by the Judiciary Committee in 1834, and which, as said by Captain Cram (Complaint, p. 8),

> "was supposed to present a more correct delineation of the waters between Lake Superior and Green Bay than any other map extant."

We find in the Library of Congress a map published by John R. Tanner in 1830, on which a continuous waterway was shown and from which Complaint, Exhibit B, was undoubtedly copied, although, on that Tanner map the group of lakes which on Complaint, Exhibit B, are connected and marked "L. Vieux Desert," on the Tanner map are marked "Lakes of the Desert."

Said map (Exhibit B) purports to show a continuous water boundary along said lines, with both Menominee and Montreal Rivers rising in a large Lake named "Lake Vieux Desert," and along the course of those rivers is plainly printed, "Boundary between Michigan and Wisconsin." By the making of this map a part of the Bill of Complaint in connection with allegations regarding it (Complaint, page 8), the complaint is made to allege that the Territorial Legislature of Wisconsin misrepresented to the world at large the true geography of that section of the now disputed boundary, notwithstanding the fact that the corrected map from which the description of the boundary was taken had been in possession of Congress two years before this map was printed. This map, showing the continuous water boundary, does not accord with that portion of the Michigan

description of the boundary, which, after following up the Montreal River to the center of the Lake of the Desert reads:

> "thence in a direct line to the nearest head water of the Menominee River,"

or, with that portion of the boundary of the Territory of Wisconsin, which after reaching the Menominee River reads (Complaint, pages 3 and 4):

> "Thence through the middle of the main channel of said river, *to that head of said river, nearest* to the Lake of the Desert; *thence in a direct line to the* middle of said lake, thence through the middle of the main channel of the Montreal River to its mouth." (The italics are ours.)

In 1838 Congress made provision for the survey of this portion of the boundary between the State of Michigan and Territory of Wisconsin, and directed that it be

> "Surveyed, marked and designated"

agreeably to the description in the Michigan Act of June 15, 1836 (Complaint, pages 5 and 6).

In 1840 the matter was placed under the supervision of the War Department, and the survey provided for was placed directly in the hands of Captain Thomas Jefferson Cram, Captain of the Board of Topographical Engineers.

It became and was the duty of Captain Cram, under the direction of Congress, to survey the line in accordance with the description in the Michigan Act.

Under date of July 30th, 1840 (Complaint, page 6), the war department gave Captain Cram instructions for carrying out said survey and in those instructions the boundary to be located is described in part, as,

> "thence through the middle of the channel of the River Montreal, to the middle of the Lake of the

Desert, thence in a direct line to the nearest head of the Menominee."

He was also advised in his letter of instructions that,

"the line from the head of the Montreal River to the head of the Menominee must also of necessity be surveyed as it is an undetermined line without distinct physical characteristics.

This line, it is said, must pass through Desert Lake. Recent information indicates a belief that there are several Lakes between the head waters of those two rivers called Lakes of the Desert. They are so delineated and named on some maps in that locality which I have examined. The survey, however, will give correct information on the subject * * * from the foregoing remarks you will require immediate survey only of Green Bay and of the Country between the head waters of the Montreal and the Menominee through which the line is to be traced * * * the first survey applied itself to the line between the head waters of the two rivers named."

By this allegation of the complaint it is charged that Captain Cram was not only advised as to the correct line he was to locate but also of the fact that there were several lakes of the Desert between the head waters of the Menominee and the Montreal and that they were not supposed to head in one Lake. Captain Cram made his first trip in connection with that survey in the summer of 1840, and was much handicapped by the fact that the Indian title had not been extinguished in much of the territory he was to traverse, and by the further fact that it was a wilderness of the wildest kind and far from any settlements of consequence, and further by having an inadequate appropriation for the work.

Instead of traversing and surveying the line in its course as laid down in the Michigan Act, Captain Cram started his survey in the reverse order, going up the Menominee

River to the Brule which he correctly designated as that branch of the Menominee, the head of which came nearest to Lake of the Desert. From the head of the Brule River he surveyed a direct line to Lac Vieux Desert which is a large Lake found by him to be the head of the Wisconsin River, and which is located some three or four miles northerly from a direct line between the lake at the head of the main channel of the Montreal and the head of the Brule. As alleged in the Complaint and shown by his report, he had much trouble with the Indians in making that survey and he expected that on reaching Lac Vieux Desert he would be at the head of the Montreal, and would find it to be the Lake named in the description of the boundary in the Michigan Act as Lake of the Desert. When he reached Lac Vieux Desert he was informed by the Indians that it would require eight days' travel by an Indian without a pack to reach the Montreal River, and that there was no lake at the head of the Montreal River but that it took its rise in a large swamp, and that the Montreal River took a different course than what it was supposed to have.

It was in October, and winter was already setting in while Captain Cram was at Lac Vieux Desert, and it would have been difficult if not impossible for him to have pushed forward to the Montreal River at that time.

Notwithstanding Captain Cram's instructions that there were supposed to be several lakes of the Desert between the head waters of the rivers Menominee and Montreal, he determined and reported that Lac Vieux Desert, where he had arrived, was the Lake of the Desert named in the description of the boundary, and was an essential point in the boundary, and that because it was not at the head of the Montreal, and the Montreal River had no lake at its head, *the line as laid down in the Michigan Act was an impossible line, and could not be laid down in the field.*

Captain Cram, in his report, referred to and made a part of the bill, correctly interpreted the understanding of Con-

gress to a certain extent as set forth in his report (Complaint, page 7), as follows:

> "1st. That Lake of the Desert referred to therein was the head water of, and discharged itself into the Montreal River; 3rd. That of all the head waters discharging themselves into the Menominee River one would be found with a head nearer to said Lake of the Desert than any other."

He distinctly erred in his conclusions, as recited in his report (Complaint, page 7), that the suppositions of Congress

> "were doubtless made by the Committee of Congress who drafted the description of the boundary, and predicated on information derived from a map similar to one entitled 'map of the entire territories of Wisconsin and Iowa, published by order of the legislative assembly of Wisconsin, by L. Judson,' and which was supposed to present a more correct delineation of the waters between Lake Superior and Green Bay than any other map extant."

As we have already shown, that Judson map does not accord with the description of the boundary as laid down in the Michigan Act or the Wisconsin Territorial Act, or the instructions to Captain Cram, and he erred in concluding that that map was the basis of fixing that boundary. He further states:

> "An exact copy of as much of said map as is necessary for illustration is attached to this report and marked No. 1.
>
> Upon this map it will be perceived that the boundary between Michigan and Wisconsin is laid down as following a direction from Lake Superior nearly southeast to Green Bay; and that the courses of the Montreal and Menominee Rivers if taken together, constitute a general route in the same direction; and that Lac Vieux Desert (Lake of the Desert) is not

only represented on this map as being the head of the Montreal, but is likewise represented as the head of the Menominee."

From the foregoing, as set out in the Complaint, it conclusively appears that Captain Cram used the erroneous map copied by Wisconsin from the map had by the Committee in 1834 and did not have the Burr map of 1836, and by the use of the erroneous map he formed a false conclusion of the understanding of Congress regarding the geography of the country. His report is a lengthy one, various portions of which are set out in the Complaint (Complaint, pages 7-17). Aside from the fact above recited as to Captain Cram's misinterpretation of the understanding of Congress in the matter, and the misrepresentation that Lac Vieux Desert was essentially a point in the boundary, the features of the report, as far as this action is concerned, are that he did locate the Brule River as that head of the Menominee River which is referred to in the description of the boundary which he was directed to survey, and thus far his action was correct and the boundary was located. From the head of the Brule River he surveyed and located a direct line to "Lac Vieux Desert" under the mistaken impression that that lake was the "Lake of the Desert" named in the description of the boundary. That being so that portion of his survey from the head of the Brule River was not in accordance with his instructions, was not a part of the boundary he was to survey, and was not binding on anyone. By his report he uses the name "Lac Vieux Desert" (Complaint, page 9), and then he places his translation thereof by following it, parenthetically with the name "Lake of the Desert." In this way he connects this Lake with the "Lake of the Desert" named in the description of the boundary, and by the use of his erroneous map and through his erroneous interpretation of the understanding of Congress he erroneously concluded that this "Lac Vieux Desert" was the "Lake of the Desert" mentioned in the boundary, notwithstanding the fact that the name "Lac Vieux Desert" had not been used in describing the boundary, or in his instructions, and notwithstanding the fact

that, through his instructions he was informed and consequently should have known that the later maps indicated there were several lakes of the Desert between the heads of the Menominee and Montreal Rivers, the truth of which his survey should determine. Notwithstanding all this, on arriving at Lac Vieux Desert and there learning that that Lake was not the head of the Montreal as he had erroneously supposed, and there being informed that it was eight days' travel by an Indian without a pack from Lac Vieux Desert to the head of the Montreal River, and being further erroneously informed that there was no lake at the head of the Montreal River but that, on the contrary, it took its rise in a large swamp, and also being erroneously informed as to the course taken by the Montreal River, he reported those erroneous matters as conclusions, and he erroneously embodied in his report the conclusion that the "Lac Vieux Desert" he had arrived at was the "Lake of the Desert" mentioned in the description of the boundary, and was an essential point in the boundary, and that because of its not being connected with the Montreal River (Complaint, page 9).

> "It is not surprising that the said description, so far as it relates to the head waters of the Montreal and Menominee, *is so worded that the conditions of the act defining the boundary CANNOT BE COMPLIED WITH* to the extent of all the requirements of the Act" (Complaint, page 8) (italics are ours).

His report further expressed the same conclusion, as follows (Complaint, page 8):

> "The survey could not have been carried any further, on account of having reached a point, beyond which the description of the boundary ceased to be in accordance with the physical character of the country."

Furthermore, as if to clinch and make definite his conclusions, which were grossly erroneous, he prepared and attached to his report his map No. 2 (Complaint, Exhibit

C), which he prepared from his erroneous information, and of this he says (Complaint, page 9):

> "Map No. 2 which is attached to this report, exhibits a more faithful delineation of the country between Lake Superior and Green Bay, along the route of the boundary, than any other map. * * * Still the map should only be regarded as an approximate of the truth; that part of it, however, which represents the district between Lake Brule and Lac Vieux Desert and which was necessary to survey, is accurate; being made from minute surveys. The same degree of accuracy is to be attributed to the portion between the mouths of the Menominee and White Rapids, and to that portion immediately north of Green Bay, and to the portion representing Green Bay itself. The other parts of the map are made from reconnaissances and explorations of the grounds *and from information derived from Indians,* whose representations are entitled to confidence." (Italics are ours.)

Referring to map No. 2 it will be seen that it does not indicate any survey in Green Bay. It does indicate the Montreal River, following up stream, taking a course very far to the east of its regular course, and taking its rise in a swamp lying to the northwest of what is now known as Lake Gogebic.

But referring to Exhibit E of the complaint, same being a map made from surveys, it will be seen that Exhibit C was extremely erroneous as to that part of the country in question lying west of Lac Vieux Desert.

As to map No. 2 as above referred to, Captain Cram further says in his report (Complaint, page 10):

> "From the course which the Montreal River is now found to have, and from the fact that the Lake of the Desert has no connection whatever with this

River, it will be perceived that it will be *impossible* to run a line according to the meaning of the words in the description of the boundary 'thence through the middle of the channel of said River Montreal, to the middle of the Lake of the Desert.' (Italics are ours.)

It is true that the channel of the River might be followed to its very head and from this head a line could be run over the ground to the middle of the Lake of the Desert; but it is not presumable that such a random line was ever intended by Congress to constitute any portion of the boundary in question. It was undoubtedly supposed that the Lake of the Desert was at the head of the Montreal; and that a natural boundary would be found to be provided all the way from the mouth of the Montreal to the middle of said lake; and that it would only be necessary to mark out a line from the middle of this lake to the nearest head water of the Menominee River."

The Complaint alleges and the exhibit shows that Captain Cram erred in his conclusions as to the course of the Montreal River and as to his conclusion that it would be impossible to run a line through the middle of the channel of said River Montreal to the middle of the Lake of the Desert, because, the allegation of the complaint, and Exhibit A show that the Lake at the head of the west branch of the Montreal River, now known as Island Lake, was then known as one of the Lakes of the Desert, and was the lake referred to in the description of the boundary as Lake of the Desert. The complaint alleging this fact, the plaintiff is entitled to and can produce further evidence confirming this allegation.

Captain Cram reached a very reasonable conclusion when he said:

> "But it is not presumable that such a random line was ever intended by Congress to constitute any portion of the boundary in question."

That random line which he speaks of is substantially the line and embodies the elements of the line which Wisconsin now claims, and which he says it is not presumable that Congress intended.

He erred in his conclusion that Congress, when it prescribed the boundary, supposed, referring to Lac Vieux Desert,

> "that a natural boundary would be found to be provided all the way from the mouth of the Montreal to the middle of the lake."

It is evident this conclusion was arrived at because of his former erroneous conclusion that a map similar to Exhibit B, his map No. 1, represented Congress' understanding of the situation. He was right in his conclusion (Complaint, page 11),

> "that it would only be necessary to mark out a line from the middle of this Lake to the nearest head water of the Menominee River."

It must be gathered from the allegations of the complaint and the exhibits thereof that Congress did so understand the situation, and had the surveyor started at the mouth of the Montreal River, and followed the course of the main channel, he would have arrived at a lake at its head, then one of the Lakes of the Desert now called Island Lake, and he would have concluded, whatever the name of that Lake might have been called locally, or even if it had no local name, that that was the lake which filled the geographical position called for and which was referred to in the description as Lake of the Desert. Having arrived at the center of that Lake of the Desert at the head of the Montreal River, using the words of Captain Cram, Congress then considered, and it was a fact,

> "that it would only be necessary to mark out a line from the middle of this Lake to the nearest head water of the Menominee River."

That line would have been a line direct from the center of

what is now Island Lake, to the head of Brule River, shown on Complaint, Exhibit E, as running from the letter C to the letter D; that being the most southerly line in that diagram, and it would have left Lac Vieux Desert far to the north of the true boundary line.

Captain Cram, in continuing his report, further said (Complaint, page 11):

> "From the foregoing description of the route, it will now appear, *that it would be exeeeedingly difficult, yea, utterly impossible,* to run a boundary in complete accord with the present reading of the description in the act of Congress; particularly on that part of the ground between the Montreal River and the head of the Menominee (the Brule), which comes nearest to the 'Lake of the Desert,' and from all the circumstances of the case, it is evident that another act of Congrses will be required in relation to this boundary, to the end of defining it in such a manner that it can be established either upon the ground or laid down on a map with that degree of definiteness, which should always characterize a boundary line between two states."

It thus appears from the allegations of the complaint that Captain Cram did not survey in accordance with his instructions any portion of the line northwest from the head of Brule River and he did not survey any portion of any line westerly from Lac Vieux Desert and he reported positively that it was impossible to survey that portion of the line in accordance with the description of the boundary.

Not only does this appear, but by the complaint it appears that that portion of the boundary never was surveyed.

It further appears that these mistaken and false representations of Captain Cram became a part of the public record by being placed in a senatorial document on file in the Library of Congress and that there they have misled and

continued to mislead the officials of the government of the United States and of the State of Michigan, especially to the effect that the Lake there referred to as Lac Vieux Desert was the Lake of the Desert specified to be at the head of the main channel of the Montreal, but was not so located, and that, as a consequence Michigan's boundary as described in its grant of statehood, could not be laid down in the field (Complaint, pages 29, 40 and 41).

In addition to the foregoing erroneous features of Captain Cram's report, principally applicable to the Montreal River section of the boundary, that being the portion west from the head of Lake Brule, Captain Cram made various recommendations as to the course to be pursued regarding future actions to establish the boundary line and, in regard to the Montreal section of the boundary he said (Complaint, page 11):

> "There is no doubt of *Lac Vieux Desert* (as written on the map and *generally so-called)* being the identical lake with that which seems to have been intended in the description of the boundary and therein called 'Lake of the Desert,' and whose middle is made one point in the boundary. * * * (Italics are ours.)
>
> Lac Vieux Desert, now being known, might be brought into the boundary, by specifying some point within the periphery of the lake for one physical point in the boundary. All indefiniteness, much labor and expense, would be avoided by simply saying, in the law, that the highest point of ground (whether of earth or rock) upon middle island shall be the point, instead of saying 'middle of the lake.' It is also evident, that it should be specified how far up the Montreal the boundary shall extend before leaving for Lax Vieux Desert. For example: The law might specify that the boundary, in ascending, shall follow the extreme right-hand channel from the mouth of the river, up to where it shall be found to be intersected by a straight line drawn from the highest point of middle island to some specified point on Montreal River."

From the complaint it does appear that Michigan had already received its grant of statehood, including dominion and sovereignty to the line described in the act of cession, and Captain Cram having erroneously decided that portions of that line could not be laid down in the field recommended an amendment to that act which, if it could be accomplished, would establish a line different from the line of Michigan's grant.

The Menominee River Section.

Captain Cram also made some representations and recommendations as to the Menominee River section of the boundary and in his report (Complaint, page 13), said:

> "The center of the main channel 'of the Menominee river' is made a part of the boundary, the River contains numerous islands, and consequently more than one channel where these islands occur. It will be impossible in many of these cases to know which is the 'main channel' without minute surveys.
>
> * * *
>
> There are also a few islands in the Brule River to which similar questions might apply, in referring to the term 'main channel.'
>
> To avoid all ambiguity in reference to these channels, it might be specified in the act defining the boundary that, in descending the stream the boundary shall follow the extreme left-hand channel of the Menominee, down to a well known point in the river —say Pe-me-ne Falls; and thence to follow the extreme left-hand channel of the remainder of the Menominee to its mouth. Such a division would leave some of the islands in Michigan and the remainder in Wisconsin, and would avoid much expense, in minute surveys to ascertain the main channel, and would leave no indefiniteness on this part of the boundary. The free use of either channel for the purpose of navigation, would, from an established

principle of law, be open at all time to the citizens of either state, *and the islands would be nearly distributed in equal proportions between the two states.*'' (Italics are ours.)

The complaint alleges (page 14) that not only did such recommendations ignore the right of Michigan under her grant of statehood, but *they misrepresented the facts, and, as a matter of fact all but one of the prominent islands in the Menominee River are below Pemene Falls,* and that such a division of the islands would be grossly unequal and grossly prejudicial to Michigan and would have granted to Wisconsin not only all the islands in the Brule, but practically all the islands of consequence in the Menominee River including the islands in the harbor near the mouth of the Menominee River.

The Green Bay Section.

As to the boundary through Green Bay, Captain Cram, in his report, said (Complaint, page 14):

> ''After descending the channel of the Menominee 'to the center of the most usual ship channel of Green Bay of Lake Michigan' the boundary is made to run 'thence through the center of the most usual ship channel of Green Bay, to the center of Lake Michigan.'
>
> From map No. 4 which accompanies this report, it may be inferred that the islands which are in the eastern part of Green Bay would cause several ship channels. It is a well known fact to all who have any personal knowledge of the navigation of this Bay that there are at least two ship channels, which are in use by all classes and kind of craft that navigate the Great Lakes. It would be next to an impossibility to collect testimony that would be necessary to decide the question which of these is the 'most usual' ship channel of Green Bay and it is not easy

> to conceive any other mode (than by testimony) by which the most usual ship channel could be ascertained. But suppose this method of collecting testimony practicable, it might occur that all the evidence that could be obtained on the subject would prove that one of these channels is just as much in use as the other; in which case it would only be shown that there is no such thing as the 'most usual ship channel' in this part of the Bay."

The report then suggests that the term "most usual ship channel" might be interpreted "the best ship channel" so that the same could be established by engineering.

He then suggests a complete description of the boundary that might be adopted all along this disputed line, but ignoring entirely the rights which Michigan then had under her grant of soverignty.

That report bears date December, 1840, and was made a part of Senatorial Document No. 151 of the 26th Congress, second session and has remained of record in the Library of Congress from that time.

Following Captain Cram's said report, with its erroneous representations referred to, the legislature of the State of Michigan, for the purpose of assisting in an amicable adjustment of the boundary which was said to be impossible of survey, passed a joint resolution as follows (Complaint, page 15):

> "Whereas a critical examination of the topography of the country through which the boundary line between this state and the territory of Wisconsin must pass, appears to render a strict and literal conformity with the directions contained in the act of Congress establishing the same *IMPOSSIBLE;* and, whereas, the general intent of said act, it is presumed, can be attained without much difficulty; if said line be immediately marked and described, therefore,

> Be it resolved by the Senate and House of Representatives of the State of Michigan that the Congress of the United States be, and they are hereby earnestly solicited to cause the line in question to be surveyed and marked; and that, simultaneously with the survey, a commissioner be appointed by the general government, to act, conjointly with the commissioner to be appointed by this state and who by concurrent action, shall so establish the boundary in question, if practicable, as shall be in conformity with the manifest general intent of the act of Congress."
> (Italics are ours.)

The word, impossible, being the same as used by Captain Cram in reference to the line shows, by inference that this resolution was based upon Captain Cram's report that the Michigan line was an *"impossible"* one. This resolution was communicated to Congress and became a part of a Senate document, which is found in Volume four of documents on page 186 in the records of the 26th Congress, second session, for the years 1840 and 1841.

The United States Congress did not act in accordance with said resolutions and did not appoint a commissioner to co-operate with a commissioner from Michigan for the purpose of determining said line, but said resolution, was in the Senate of United States, laid on the table, and apparently has there rested (Complaint, page 16). Following this, however, and on the 3rd day of March, 1841, in an appropriation bill, and by Section 3 thereof Congress did provide in regard to said boundary as follows:

> "That for the purpose of designating and marking the boundary line between the State of Michigan and the territory of Wisconsin agreeably to the true intent and meaning of the second section of the act entitled: 'An act to establish the northern boundary line of the State of Ohio, and to provide for the admission of Michigan into the Union, upon the conditions therein expressed,' there be, and is hereby appropriated, the

> sum of six thousand dollars, to be expended under the Secretary of War, *in the survey and examination of the country situated between the mouths of the Menominee and Montreal Rivers,* who is hereby directed to cause to be made a plat or plan of such survey and examination, which shall be returned to Congress with all convenient dispatch." (Italics are ours.)

Thus the complaint shows that no further survey of the Michigan boundary line was provided for or directed, but that, because of the erroneous report of Captain Cram to the effect that the boundary was an imposisble one, Congress provided for and directed the War Department to have made a survey and map of the entire country between the mouths of the Menominee and Montreal Rivers, and, in the wording of the act, that survey and map was to be made to aid Congress in *designating and marking the boundary line* between the State of Michigan and the Territory of Wisconsin *in accordance with the description in the Michigan grant.*

Pursuant to this provision for a survey of that country, Captain Cram was again sent by the War Department to do the work, and he made his second expedition in the year 1841; his report of which is found in Senate Document 170, 27th Congress, second session, referred to in the bill of complaint on page seventeen. The War Department in instructing him as to his work, said (Complaint, page 17):

> "Your operations should have in view a correct delineation of the country between the head waters of the Menominee and Montreal Rivers, *so that all the matters requisite to determine a boundary between these two points can be laid before Congress.* A correct survey of these two rivers should also be made, which will probably be the extent of your operations for this year." (Italics are ours.)

Thus it must be acknowledged that by the complaint it is alleged that Captain Cram knew what his report recited and knew that he was making a map to aid Congress in fixing the line which he had reported could not be laid down.

The complaint further recites from Captain Cram's report of his said second expedition that, referring to his former work:

> "The conclusion was drawn, that there was not to be found existing in nature any continuous natural boundary—as had been supposed in the act of Congress defining the boundary—between the head waters of the Menominee and Montreal Rivers, and therefore, it became necessary to make a delineation of the country intervening between these head waters, and along in the intended direction of the route of this boundary."

This further shows convincingly that Captain Cram knew that he was not surveying a boundary in his expedition but was to aid Congress in trying to locate the boundary according to its original intent, occasioned by his having reported it impossible to locate it as described by Congress.

Captain Cram further reported that

> "accordingly the survey of this intervening district was commenced at Lac Vieux Desert (see map No. 1), the place where the operations stopped in the Autumn of 1840, and was extended in the direction, as nearly as could be ascertained, toward the head waters of the Montreal."

As further said in the complaint, the report showed that Captain Cram first mistook the Ontonagon for the Montreal, and afterwards discovered also that Lac Vieux Desert was the head of the Wisconsin River instead of the Montreal as he had at first supposed. By his report he further reported:

"Map No. 1 exhibits the head waters of the Montreal as they were subsequently found, and during the progress of our survey. The point designated 'astronomical station No. 2' *is the head proper of the Montreal River* of Lake Superior and is the junction of two inconsiderable streams, not more than twenty or thirty feet wide, called Balsam and Pine Rivers.

The latter of these streams was explored to its very head and found to come from a small lake and all its feeders are represented on the map (No. 1). This small lake was connected by an offset line with the main line of survey; so that if Congress should deem it necessary or expedient to constitute this little lake, which I have called Pine Lake, as the head of the Montreal River, its position will be accurately known." (The italics are ours.)

By his report, Captain Cram says he combines the five maps referred to therein, into a sixth map, and map No. 6 of his report is made Exhibit D of the bill of complaint. By said map, made a part of the bill, the bill is made to allege that Captain Cram reported the Montreal River as substantially a single stream with several branches running into it from the west and with lakes at the head of nearly all those branches. He did not report going to the west branch of the Montreal River at all or making any comparison between the east and west branches. By Exhibit E of the bill, made from surveys, it appears that gross inaccuracy occurred in map No. 6 attached to Captain Cram's report. Furthermore as to Captain Cram's report, it is alleged by the bill that he was informed that there was supposed to be a lake connected with the Montreal River, to which the boundary was to run, yet he arbitrarily reports that astronomical station (Complaint, page 18) at a point where the east branch of the Montreal is made up of two forks which he names the Balsam and the Pine is the head proper of the Montreal and he describes the lake at the head of the Pine as a very small lake, and the Pine and the Balsam as inconsiderable streams.

It is then alleged in the complaint (page 20) that the stream shown on the map and surveyed by Captain Cram is the lesser branch of the Montreal River and that the point marked by Captain Cram as the head proper of said stream is more than six miles north and down stream from the lake at its head now known as Pine Lake. Also that the west branch is claimed by Michigan to be the main channel of the Montreal River and was not mentioned by Captain Cram, or shown as such on his map, and that the said survey of the east branch of the Montreal made by Captain Cram does not purport to have been carried to the main channel of said Montreal River, except below the points where the east and west branches of the Montreal River unite, and that the main channel, later found to be the west branch of said Montreal River, was ignored by Captain Cram in making his said survey and that thus his survey did not meet the requirements of Congress to provide a map showing the situation of the whole country between the mouths of the two rivers, and he *then had no authority* to designate which branch was the boundary. He was mapping the country *to assist Congress in designating the line intended.*

In this connection and by reference to the survey of the Montreal River a map of which may be found in the Library of Congress, as having been made by Captain Cram at that time, although not attached to his report, it must be conclusively presumed, that Captain Cram did not survey the west branch. He shows detailed drawings of the east branch and calls that the Montreal River. It is significant that he generally indicates numerous rivers coming in from the west which are not shown in detail, and one of these, more nearly than any other taking the place of the west branch, he calls "Middle River," and it is fair to conclude that he recognizes this as the middle River of the Montreal System of Rivers, but as to why he calls it Middle River no explanation is made, and it is not so shown on any other map we have seen. It is thus seen that Captain Cram did not so survey, map and report the entire country between the mouths of the two rivers as would enable Congress to have a correct representation thereof, and he did not cor-

rectly represent on his map the west or main channel of the Montreal River. From the fact that it has since been determined by various parties that the west branch is the main channel, it may be seriously questioned whether Captain Cram made even a reconnaissance of the west branch, and it seems more probable that he or his assistants sketched those western branches of the Montreal, including the west branch, from inquiry, or from a very cursory running through of the country. At any rate he does not report any detail regarding them that could be intended as a guide to Congress.

Captain Cram's second report does confirm the position of plaintiff as to the fact that there were a large number of lakes between the heads of those two rivers that were called the Lakes of the Desert, or, more properly speaking, they were termed, in French, Les Lac Vieux Desert which, translated into English should not be called Lakes of the Desert, but, Lakes of the old deserted place, or old place. True he does not so name them in his report, but he does say (Complaint, page 20):

> "The country was examined laterally to the main line, and is shown by the dotted lines on the map; and it may be said there is no direction that can be followed from an assumed point as a center which will not lead into a series of small lakes, in this part of the country. These little lakes, so beautifully diversified in size, shape and scenery, are but the limpid springs which form the summit reservoirs that nature seems to have furnished with admirable foresight for a never failing supply for the Chippewa, the Wisconsin, the Menominee, the Ontonagon, and several smaller streams such as the Montreal, the Carp, the Iron, etc." * * *

Thus he does include all those lakes from the Montreal to the Brule as a collection of lakes, which accords with the map, Exhibit A of the complaint, naming them all Les Lac Vieux Desert, although it does not give others than the

principal ones of those lakes. It does include the lake at the head of the Montreal and at the head of the Brule there shown as a part of the Menominee.

In justice to Captain Cram and explanatory of the situation reported by him, the complaint does give (page 21) the lengths of his various lines including the statement that the whole length of the surveyed line from the head of the Montreal to the head of the Brule is 100 miles, 2199 feet, and commenting upon the fact that using Lac Vieux Desert as a point in the boundary would make an angle and that such an angle would make an awkward boundary, Captain Cram does say:

> "As there is no natural boundary to be had between the head waters of these two rivers—the Menominee and the Montreal—it would seem that a straight line from the head waters of one to those of the other would be much preferable to an indirect line composed of two which would make an agle with each other."

It is significant that if Captain Cram had in the first instance followed his instructions to survey the line in accordance with the Michigan act he would have found a line exactly in accord with the one just suggested by him—a line direct from the head of the main channel of the Montreal to the head of the Brule.

The complaint further emphasizes the fact of Captain Cram's mistaken idea of the boundary he was supposed to survey on his first expedition by quoting from his second report (Complaint, page 21), as follows:

> "To complete the boundary, however, either a direct or indirect line, *as Congress may see fit to designate,* will have to be run and marked out on the ground, for at least sixty miles *if the direct line be adopted,* and for more than that distance if the angular route be insisted on. *I say insisted on, for the present law makes 'the middle of Lac Vieux Desert' a point in the boundary.*" (Italics are ours.)

Here he again emphasizes the fact of his mistaken translation of the name "Lac Vieux Desert" to "Lake of the Desert" which he does in his original report by carrying the name "Lake of the Desert" into a parenthesis immediately following the name of Lac Vieux Desert, and it should be noted in this connection, that by calling Lac Vieux Desert the Lake of the Desert, the name used in the description of the boundary in connection with the lake connected with the main channel of the Montreal, he confounds the one lake with the other, and decides, erroneously, that Lac Vieux Desert is an essential point in the boundary when evidently it was not. The quoted portion of his report shows conclusively, also, that he did not consider that on his second expedition, he was surveying the boundary because of his reference to the boundary as a line which "Congress may see fit to designate" and again as, "if the direct line be adopted."

As a consequence the bill shows that the work of Captain Cram in his second expedition, not only through the country between the heads of the two rivers, but in surveying the east branch of the Montreal and reporting it as the Montreal, was not the work of a surveyor appointed to lay out and designate a definite line provided for, and cannot therefore be given the effect that is given to the official operations of a surveyor when directed to lay out or locate a certain definitely described line in which his judgment is often required to be used.

In addition to what we have already said as to the work of Captain Cram in surveying the east branch of the Montreal, we refer to the quotation from his report (Complaint, page 22), and his map, as confirming the position of plaintiff that he did not survey and report in detail any branch of the Montreal except the east branch and that is naming a point on the east branch six miles and more below the Lake at the head thereof, as the head proper of that river, he acted arbitrarily and without any authority.

Therefore, there must be a conclusion, from the statements in the complaint, that Captain Cram, through his two reports grossly misinformed Congress and the people as to several essential features necessary to be known in order to properly lay down on the ground the boundary line of Michigan as designated in its grant. He was himself mistaken as to what Congress thought as shown by his having used the incorrect map which was published by order of the Wisconsin Legislative Assembly and having supposed that to be the map or a copy of the map from which Congress drew the Michigan boundary line. He was wholly mistaken in his conclusion and report that Lac Vieux Desert, then and now so known, was the Lake of the Desert mentioned in the description of the boundary and he was mistaken in the further portion of his first report to the effect that the description of the boundary in the Michigan act was an impossible line and could not be laid down in the field. In his second report he made the mistake of taking the east branch of the Montreal as the Montreal River referred to in the boundary and of then surveying that in detail, and not surveying or reporting the west branch thereof in detail, and he made the further mistake of establishing the junction between the two forks of the east branch, which he calls the Pine and the Balsam, as the head proper of the Montreal. By the complaint it is shown that these two reports became public records as Senatorial documents and they misled the officials of the United States and the State of Michigan in connection with their then future dealings with that line and that the errors which so misled the people were not discovered until very recent dates.

Further considering the allegations of the complaint as to Captain Cram's reports upon the Menominee River and Green Bay sections of the boundary, we refer to page 23 of the complaint wherein by his first report, he refers to the Brule River as the branch of the Menominee named as a part of the boundary. It does not, however, show that he surveyed the main channel or located any of the islands therein with reference to the main channel.

Speaking of these two rivers he does say, in his second report:

> "The Brule and Menominee constitute a very good natural boundary; the precaution, however, should be taken of dividing the numerous islands so that some may fall within one, and the remainder within the other state. The number of islands in the Menominee amount to 131; 18 of the principal ones contain 2,304 acres; some of these are over one mile in length and from one-eighth to one-fourth of a mile in breadth and are covered with an excellent growth of Pine.
>
> Innumerable channels occur among the groups of islands, and the best way of disposing of the islands, would be, to declare, by legislative amendment, that all the islands down to a certain point (to be specified) shall belong to Michigan, and all below that point to Wisconsin. A case of litigation has already commenced, I am informed, in reference to one of these islands, and the court has been at a loss to decide, from not knowing to whose jurisdiction it belongs."

We have heretofore referred to his first report and recommendations as to these islands which was to the effect that Wisconsin be given all the islands below Peneme Falls and Michigan those above and his statement that such a division would be nearly an equal division between the two states, and to the fact that such a representation is erroneous because nearly all the important islands are below Peneme Falls and would have, had his recommendations been carried out, given practically all the important islands to Wisconsin. Further significance should be given to the fact that through this quotation from his report the complaint is made to show that the Menominee River was not so surveyed as to determine where the main channel runs and that it would be a difficult matter to determine where the main channel is in various parts of the stream; thus making it absolutely necessary that a survey be made in order that each state know to which the several islands belong.

He again refers in his second report to the line through Green Bay (Complaint, page 24), where he says:

> "It only remains necessary to make the survey of the channels of Green Bay, and of the lower part of Menominee River. Then, and not until these surveys shall have been completed, will the survey be finished, to leave nothing more to be desired."

Therefore, by the said quoted report it is shown and charged in the complaint that the survey through Green Bay has never been made and that it cannot be known where the line runs until such survey is in some way made. It is evident, from the language of the description, making the most usual ship channel the boundary, that that line must be established by evidence and that is one of the features of the bill and one of the reasons for bringing this action. The bill does allege as the claim of Michigan that a proper establishing of that line would leave certain important islands within the Michigan boundaries that are now claimed by Wisconsin.

It therefore conclusively appears by the reports of Captain Cram that surveys are necessary in order to establish the boundary line of Michigan down the Menominee River and through Green Bay and that no such surveys have been had.

December 14th, 1842, following the filing of said second report of Captain Cram, a bill was introduced in the 27th Congress, third session, being Senate Bill No. 9, to amend the act which admitted Michigan into the Union but so changing its northwestern boundary as to make the same read substantially in accordance with the boundary at present claimed by the State of Wisconsin, but in said bill there was a proviso as follows (Complaint, page 24):

> "That the adjustment of boundary as fixed in this act shall not be binding on Congress, unless the same shall be ratified by the State of Michigan on or before the.....day of....., 1847."

Said bill failed of passage in the House. It was reintroduced as Senate Bill No. 6, December 15th, 1843, in the 28th Congress, first session, and again failed to become a law.

These items not mentioned in defendant's brief we believe, are significant from two points of view, first, that by the insertion of the proviso, Congress recognized that it could not change Michigan's boundary unless such change was ratified by Michigan, and, second, the fact that such a bill, which might effect a change of Michigan's boundary, introduced in two separate Congresses, failed of passage, which in effect was a rejection by Congress, probably influenced by Michigan, of the attempted change of boundaries.

Thus Michigan's rights under her boundary as described in her statehood act of June 15th, 1836, remained unchanged and with requests for a change refused by Congress when, August 6th, 1846, Congress passed the Wisconsin enabling act.

At that time the people of Wisconsin Territory abandoned their territorial boundary along the line in question, and described a new, proposed boundary following to a large degree the recommendations of Captain Cram (Complaint, page 25). That boundary runs *with the Michigan boundary* through Lake Michigan and Green Bay to the mouth of the Menominee River. From there, while it follows the Menominee River and the Brule River, it does not designate the main channel of each of those streams but does provide:

> "To prevent all disputes in reference to the jurisdiction of the islands in said Brule and Menominee Rivers, the line be so run as to include within the jurisdiction of Michigan all the islands in the Brule and Menominee Rivers (to the extent to which said rivers are adopted as a boundary) down to and inclusive of the Quinnesec Falls of the Menominee, and from thence the line shall be so run as to include within the jurisdiction of Wisconsin, all the

islands in the Menominee River from the Falls aforesaid, down to the junction of said river with Green Bay."

It will be noticed that this description of the boundary through the two rivers, Menominee and Brule, varies from the recommendations of Captain Cram in that it proposes giving to Michigan the few small islands in the Brule River but it stops with Michigan's islands at Quinnesec Falls instead of Peneme Falls, and proposes to give to Wisconsin all the islands below Quinnesec Falls, which as a matter of fact would be giving Wisconsin all the important islands of the two rivers.

From the head of the Brule River the proposed Wisconsin boundary, instead of running to the Lake of the Desert which was at the head of the main channel of the Montreal, runs as Captain Cram proposes and in accordance with his conclusion that Lac Vieux Desert was an essential point in the boundary, from the head of the Brule River to a point in Lac Vieux Desert and from there to the point on the east branch of the Montreal which Captain Cram arbitrarily described as the head of that river, instead of to the Lake at the head of the west branch, or main channel of the River Montreal then known as one of the Lakes of the Desert, but now known as Island Lake, and from Captain Cram's arbitrary location of a head for the Montreal River more than six miles below the lake at the head of the east branch thereof the line is made to run down the east branch, instead of the main channel, to the point where the Montreal forks into the west and east branches, and then in the proper course to Lake Superior.

After describing such a line for Wisconsin's proposed boundary, which materially differed from the boundary of the State of Michigan, not only because of the change in regard to the Islands in the rivers but because of the change occasioned by the mistakes of the engineer in his reports of the Montreal River section, Congress inserted in the Wisconsin Enabling Act this provision.

> "That the adjustment of boundary as fixed by this act between Wisconsin and Michigan shall not be binding on Congress unless the same shall be ratified by the State of Michigan on or before the 1st day of June, 1848."

It is therefore made apparent by the bill that Congress still continued to recognize that it had conveyed to Michigan the right of sovereignty and domain to the boundary line as described in the Michigan act and that it could not grant to Wisconsin anything within those Michigan boundaries except on the express ratification of Michigan and it thus provided that such ratification must be had within the period specified which was nearly two years.

By this Wisconsin knew that she had no grant from Congress of any territory that might be within the lines of the Michigan boundary, or rather that her grant would not be effective unless she got the ratification of Michigan within the date specified.

Michigan did not ratify Wisconsin's proposed boundary and therefore and by failing so to do said to the world that she rested on her boundary as described in her act of statehood.

The matter then rested before the people upon the showing that Michigan was entitled to the boundary as described in her act and was insisting upon those lines in so far as they could be laid down, but, with the representation of Captain Cram, who history tells us was a great and usually dependable engineer, and who was captain in the department of Topographical Engineers of the War Department of this government, remaining in the public records. His report stated to the world that the Michigan line could not be laid down because of geographical conditions, and that Lac Vieux Desert, more than sixty miles from the head of the west branch of the Montreal, was an essential point in the boundary and that the stream we now know as the east branch of the Montreal was the Montreal River,

or the main channel as described in the Michigan Act. In this connection it must be considered as the bill shows that at that time that portion of the country was a vast and complete wilderness and knowledge of its geography was but very scant; therefore much, if not complete, reliance was placed upon the report of Captain Cram upon the points mentioned and it was reasonably supposed that because of geographic conditions the Michigan line could not be exactly laid down, but that Wisconsin's proposed line was practically the same as the Michigan line was by Congress intended to be.

The allegations of the bill to the effect that Captain Cram's report misled the people to believe that the line claimed by Wisconsin was not materially different from the line of the Michigan grant is supported by Captain Cram's first report, and we refer to the passage beginning at the bottom of page eight (Document, 151), of that report where he says:

> "With the modifications now respectfully suggested the description of the boundary would be to the following effect, to-wit:
>
> 'To the mouth of the Montreal River (Lake Superior); thence (in ascending) through the center of the extreme right-hand channel that the said Montreal River may be found to have, as far up the same as where the said channel shall be found to be intersected by a direct line drawn from the highest point of ground on Middle Island of Lac Vieux Desert, north * * * degrees west, thence (from the said intersection) along the just described line, to the said point of Middle island; thence (from the said point of Middle Island) in a direct line to the center of the channel of the outlet of Lake Brule, thence following the center of the extreme left-hand channel of the Brule River (Wesacota Sepe) down to the middle of the channel of the Menominee River; thence following the center

> of the extreme right-hand channel of the Menominee River, down the same, to the head of the Pe-me-ne Falls; thence following the center of the extreme left-hand channel of the Menominee River, down to the center of the best ship channel of Green Bay of Lake Michigan; thence following the center of the best ship channel of Green Bay to the middle of Lake Michigan.'
>
> *Such a description as this, if authorized by Congress, would allow the boundary being established without any material difficulty; and it would cause no material departure from what is conceived to have been the intention of the law as it is now worded.* The proposed description would moreover *leave the State of Michigan and the Territory of Wisconsin with nearly the same relative quantities of territory as they would have respectively possessed had the Montreal, and the Menominee and Lac Vieux Desert, been found situated as was supposed in* framing the present law of the boundary.'' (Italics are ours.)

Not only does the bill show by allegations but it is made definite by Exhibit E made from surveys, that that representation was wrong and that all the variance in the lines is at the expense of Michigan and no part of any variation is taken from the territory of Wisconsin, unless, possibly a few small islands in the upper rivers.

It might be further noted in this connection that had Captain Cram's suggestion been followed in full he would have ascended the right-hand channel of the Montreal River, which is the west of the two principal branches. His suggestions seem only to have been followed in making up the Wisconsin proposed boundary where the suggestion would operate to the benefit of Wisconsin, and as may be justly inferred from allegations of the complaint, this was occasioned because the principal citizens of Wisconsin then lived at Green Bay, which was the principal town in Wisconsin and only fifty miles distant from the mouth of the Menominee River, where they could get at all known facts

regarding the Country, while Michigan had no one interested in this part of the boundary, living nearer than the City of Detroit many hundred miles away.

The fact that it was a wilderness of the wildest kind, as alleged in the bill, is further shown by the concluding section of his said first report which says:

> "Owing, however, to the absence of all facilities in a wilderness like that of the route of this boundary, the costs of the necessary operations for establishing the boundary between the mouth of the Montreal and Lac Vieux Desert, thence to the outlet of Lac Brule will not be less than ten thousand dollars;"

and the final winding up clause of that paragraph reflects the truth of the plaintiff's position as to the survey of Green Bay where he says:

> "and the cost of the survey of the eastern part of Green Bay to discover the best ship channel, will be not less than three thousand dollars."

In that connection it should be noted that he anticipates that the description of the boundary will be so amended as to name the BEST instead of the *most usual* ship channel, but, that even then he expects the best ship channel will be in the *eastern part* of Green Bay.

We further refer to and quote from his second report to emphasize not only the allegation but the proofs of some of the essential elements of the bill (page five Senate Document 170 aforesaid) where in writing of the Montreal river he says:

> "The head proper of the Montreal is to be regarded, as before stated, at the junction of the Balsam and Pine."

And on the same page:

> "The Montreal is but a secondary stream, to say

the best for it. It presents, however, a great variety of beautiful scenery, *and the extreme wildness of its features* possess peculiar charms for the lovers of the picturesques." (The italics are ours.)

On page six of the same report he says:

"Lastly: the five maps, which, until now, have been separately considered, all combined by a proper connection of the lines of the survey, form a general map, No. 6, *so as to exhibit,* on a scale of twenty miles to one inch *the whole route of the boundary all the way through from Green Bay of Lake Michigan to Lake Superior; also all the parts of Michigan and Wisconsin, which can possibly be supposed to hape any bearing, either direct or indirect upon the question of the boundary.*

This general map has been compiled with care, and it is presumed to have all the accuracy that can be desired for the immediate object in view."

From this not only Congress, but the public at large were informed by an authority as high as the Captain of Topographical Engineers of the War Department, that that map exhibited a substantial geography of all the features essential to laying down the boundary line as in the Michigan Act. Nevertheless it is now shown that it did not represent, if at all, with any degree of accuracy, the west branch of the Montreal River, which the complaint now shows to be the main channel of that river and the one designated as the boundary of Michigan.

In the appendix to that report (page 8), Captain Cram further says:

"The importance of the portion of country lying between Lakes Superior and Michigan, and through which the route of the boundary passes; the indirect as well as the direct bearing which the portions of country adjacent thereto may well be thought to have upon the definite settlement of the question

> of this boundary, seem to require a general map, representing an area of the earth's surface of ten degrees in longitude and eight degrees in latitude. Accordingly, this map has been constructed to represent that portion of the terrestrial surface embraced between meridians whose longitudes are eighty-four degrees and ninety-four degrees west of Greenwich, and between the parallels forty-one degrees and forty-nine degrees north latitude."

Thus again Captain Cram places emphasis on the accuracy and the importance of this map which does not show the west branch of the Montreal and which does show the head proper of the east branch of the Montreal to be more than six miles down river from the Lake at its head, which lake he belittles by representing it as a small lake, and he gives to the river leading to that lake and the lake, the names of Pine River and Pine Lake, thus misleading the people to believe, as he had reported in his first report, that there was no lake at the head of the Montreal River, and that, therefore another point in its course had to be selected for the departure of the boundary line towards the source of the Menominee River, and, by his report he gave his reason for fixing that point as the head proper of the Montreal, in the fact that the Balsam and the Pine (so-called by him), coming together at that point were "inconsiderable streams" above that point.

That map six which he refers to is Exhibit D of the complaint, and by an examination thereof it can be readily seen that a person examining it would be led to believe that Captain Cram's representations as to there being no material variances in the proposed line from that of the Michigan boundary was correct, and they had the right to rely thereon and did so.

From all the foregoing it appears that, even though it had been represented that Wisconsin's proposed line was substantially the same as the Michigan boundary, yet, Congress had refused to assert the correctness or to definite-

ly establish the Wisconsin boundary and Michigan had failed to assent to or ratify Wisconsin's. In this condition, in the year 1850, the State of Michigan adopted a new constitution and therein recited a description of that portion of the boundary now in question, as follows (Complaint, page 29):

> "To the mouth of the Montreal River; thence through the middle of the main channel of the River Montreal to the head waters thereof; thence in a direct line to the center of the channel between Middle and South Islands in Lake of the Desert; thence in a direct line to the southern shore of Lake Brule; thence along said southern shore and down the River Brule to the main channel of the Menominee River; thence down the center of the main channel of the same to the center of the most usual ship channel of Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said Bay to the middle of Lake Michigan."

The complaint charges that by said description the constitution of the State of Michigan re-affirmed its claim to all the territory on the Michigan side of the main channel, that being west branch of the Montreal River to its head waters, that being Island Lake, but that from there the line was diverted from its proper course which should have run to the head of the Brule River, to the point named in Lac Vieux Desert or Lake of the Desert, as is mentioned, because said report of said Captain Cram had asserted that said lake was the lake referred to in the description of the boundary in the Michigan Act and was an essential point in the boundary, and that the geography of the country was not sufficiently known to inform the members of the constitutional convention, or the people of Michigan otherwise.

This assertion is substantially proved by the references to the reports and the maps heretofore had, and the essen-

tial deductions therefrom and from the discussions in the convention.

We desire especially to call the attention of the court to the fact that by this constitutional provision Michigan did expressly reaffirm its right to the middle of the main channel of the Montreal to its head waters, and it did expressly reaffirm the fact that its boundaries followed the main channel of the Menominee River and the most usual ship channel of Green Bay.

It is further alleged (Complaint, page 30) that in 1867 Michigan had another constitutional convention which formulated a constitution that was thereafter submitted to the electors of Michigan but was defeated, and it is shown that in that proposed constitution the description of the said boundaries in said respects more nearly followed the boundary as described in the Wisconsin act, and said description as set forth in that proposed constitution is set forth on said page thirty of the Complaint. It will be noted, that although the description of the boundary as specified in said proposed constitution was made through misinformation to more nearly follow the recommendations of Captain Cram by mentioning the head waters of the Montreal as being marked on the survey made by Captain Cram and did run said line to the said so-called Lake of the Desert and from thence to the shore of Lake Brule, it again reasserted Michigan's boundaries as running down the main channel of the Brule River, to the Menominee River and down the main channel of the Menominee River to the center of the most usual ship channel of Green Bay of Lake Michigan and thence through the center of the most usual ship channel of Green Bay to the middle of Lake Michigan.

It is asserted (Complaint, page 31) that it was not then known by the members of said convention that any mistakes had been made by said Captain Cram in his said report and it was not then known that there was really any discrepancy between the line of boundary as described in

said Wisconsin statehood act and that described in Michigan's statehood act, and that it was argued by members of the convention that there probably was none and it was important to have the question of the line settled, while on the other hand there were arguments that if there were any mistakes regarding said boundary, by the adoption of the proposed description in the proposed constitution, valuable rights of Michigan might be forfeited. It is further alleged that although that constitution with the proposed change in he boundary to accord in part with Wisconsin's proposed boundary, was submitted to the people of the State of Michigan, the people refused to adopt the same, and thereby refused to adopt or ratify the boundary line as described by Wisconsin.

The State of Michigan should have the right to submit its proofs to substantiate these allegations though, in fact, they are substantially supported by the documentary evidences found in the proceedings of that convention and in the reports and maps above referred to, combined with the fact that that country was a wilderness during all that period so that no one would have any occasion to learn that there was a discrepancy between the described line of the Michigan boundary and that claimed by Wisconsin.

It is the claim of Michigan as alleged in its complaint that the various errors in the reports and maps above referred to and in the improper locating of the east branch of the Montreal as a boundary line for Michigan, remained undisclosed to the people of Michigan until about the year 1885 and that from that time on, from time to time, different elements of the situation were discovered by individuals, but none of the said errors came to the attention of the officials of the State of Michigan until 1907 and then only as to the error in locating the east branch of the Montreal as the boundary. It is also asserted that the error of Captain Cram in declaring and reporting that Lac Vieux Desert was the Lake of the Desert referred to in the boundary, and his report that the Michigan line could not be laid down in the field was an error, and also

the fact that Islands surveyed in the Menominee River as being a part of Wisconsin were in reality on the Michigan side of the main channel, and that Islands in Green Bay surveyed by the government as being in the state of Wisconsin were in reality on the Michigan side of the most usual ship channel only came to the attention of the officials of the State upon the reports of the present commission made in the year 1921, and thereafter.

For a little more in detail upon this point it is alleged (Complaint, page 31) that about the year 1885 George H. Cannon, an engineer, on a private mission, went into the wild region of the Montreal River and there discovered that the west branch of the Montreal River was the main channel and that the east branch, a minor channel had been surveyed and reported by Captain Cram as the boundary. It is there further alleged that as time afforded said Cannon made a study of the matter and brought the same to the attention of Hon. Peter White, who in turn brought the same to the attention of the attorney general of Michigan in or shortly prior to the year 1907, *when the State,* through its officers, *for the first time* learned that that part of the boundary along the Montreal River and from there to Lake Bruel had been improperly located, and had not been located in accordance with or agreeably to the provisions of the Michigan statehood act of June 15th, 1836, and that, in February, 1907, the Michigan legislature adopted a joint resolution providing for the appointment by the governor of a resident of Michigan to present the matter to the legislature of Wisconsin with a view to the settlement of the boundary through a joint commission. That said Hon. Peter White was appointed to act for Michigan in that regard and through correspondence and by a personal visit to the governor and to the committee of the legislature of Wisconsin, said White attempted to secure an amicable adjustment between the two states as to the said boundary, but he was met with a refusal on the part of Wisconsin to join in any attempt at such adjustment of said boundary line. That Mr. White

duly reported to the Michigan Legislature the result of his mission, and, May 29th, 1907, the Legislature passed a concurrent resolution (Complaint, page 32) directing the Attorney General to cause a survey to be made, and to institute the necessary proceedings in the court or otherwise to secure a determination of the correct boundary line between the State of Michigan and the State of Wisconsin.

Certainly that is an allegation in the bill of complaint as to the first time and the manner in which the errors of Captain Cram, and the transgressions of the State of Wisconsin, were brought to the attention of the officials of the State of Michigan.

The complaint further alleges (page 32) that investigation was started by the then Attorney General, and an engineer was employed to make some investigations of the matter of the boundary, but that no survey was made, and the complaint alleges that the investigation was not complete and no report thereof was filed by the then Attorney General (whose term of office expired before the investigation could be fully completed). Upon this point we will say to the court, that the plaintiff expects to prove that in conducting the investigation that was started in 1907 considerable reliance was had on the assistance of said Hon. Peter White who lived in the Upper Peninsula of Michigan and had interested himself in the matter, but that he became ill and died in the year 1908, and that fact may account in part for such delays as occurred in conducting the investigation, and the plaintiff expects further to prove that the nature of the questions involved, and the broad scope of the many elements involved, rendered a complete investigation thereof practically impossible, other than by a person who could give practically his undivided attention thereto, and even then short of several years' work therein.

The bill of complaint (page 32) further asserts that in 1908 Michigan adopted a new constitution and therein set

forth that portion of her boundary now in question, in words as follows:

> * * * "to the mouth of the Montreal River; thence through the middle of the main channel of the westerly branch of the Montreal River to Island Lake, the headwaters thereof; thence in a direct line to the center of the channel between Middle and South Islands in the Lake of the Desert; thence in a direct line to the southern shore of Lake Brule, thence along said southern shore and down the River Brule to the main channel of the Menominee River; thence down the center of the main channel of the same to the center of the most usual ship channel of Green Bay of Lake Michigan; thence through the center of the most usual ship channel of said Bay to the middle of Lake Michigan."

Thus it will be seen that after the information gained through Mr. Cannon as to the fact that the east branch was not the main channel, it did on its first opportunity, in so effective a manner as making its constitutional boundaries specific, positively assert the Montreal River section of its boundary as following the center of the main channel of the *west branch to Island Lake, the head waters thereof* and it again reasserted the main channel of the Menominee and the Brule Rivers and the most usual ship channel of Green Bay as being its boundary, but it did diverge from its rightful boundary between Island Lake and the head of the Brule River, by making an angle with Lac Vieux Desert, therein called Lake of the Desert, as a point in the boundary.

The complaint alleges (page 33) that the said boundary described in said constitution was allowed to deviate from the real boundary of Michigan as described in its grant because it was still believed, as a result of Captain Cram's first report, that Lac Vieux Desert, called Lake of the Desert in said last mentioned constitutional description, was the Lake intended by Congress to form a point in the

boundary and was therefore an essential point in such boundary, *and it was not* known to the members of said constitutional convention or to the officers of the state of Michigan, or generally to the people of the State of Michigan, that, at the time of the admission of Michigan into the Union, there were a large number of Lakes of the Desert, and they were misled in the description of said boundary and named the point between middle and South Island in said Lake of the Desert as a point in said boundary because of said misrepresentations contained in said report of said Captain Cram and in the belief occasioned thereby that said Lake of the Desert there referred to was the Lake of the Desert designated in the boundary as described in the Michigan grant of statehood, as represented by said Captain Cram in his said report.

Far from being an act of acquiescence in Wisconsin's claims, this was a positive act asserting Michigan's rights so far as Michigan then knew them, and consequently so far as Michigan could be expected to assert them.

The Burt Survey.

One feature of the transactions set up in the bill of complaint (page 27) referred to the Burt survey of Cram's line and by defendant's brief on the motion it is claimed that in submitting thereto Michigan acquiesced in the Wisconsin line. The facts in regard to that survey, as so set out in the complaint are to the effect, that August 10th, 1846, only four days after the passage of the Wisconsin Enabling Act, in which its claimed boundary was made conditional on the ratification thereof by Michigan, Congress included in its general appropriation act there referred to, a provision there quoted, as follows:

> "Sec. 4. And be it further enacted that the surveyor general northwest of the Ohio, under the direction of the president, be, and hereby is required to cause to be surveyed, marked and designated, so

> much of the line between Michigan and Wisconsin as lies between the source of the Brule River and the source of the Montreal River, *as defined by the act to enable the people of Wisconsin territory to form a constitution and state government,* and for the admission of such state into the Union, and the expense of such survey shall be paid, upon the certificate of the Surveyor General, out of any moneys in the Treasury not otherwise appropriated, not exceeding *one thousand dollars.*" (Italics are ours.)

In this connection we call attention to the fact that pursuant to this appropriation the Burt Survey was made, not of the Michigan boundary line, but of the conditional Wisconsin line that had been recommended by Captain Cram, which boundary was specifically designated in the Wisconsin act (Complaint, page 25), as running from Lake Brule.

> "in a direct line to the center of the channel between middle and south Islands, in the Lake of the Desert; *thence in a direct line to the head waters of the Montreal River, as marked upon the survey made by Captain Cram;*" (The italics are ours.)

It will thus be seen that Mr. Burt had no discretion left to him, but he was to locate the conditional Wisconsin line as it had been reported by Captain Cram, from the head of Brule Lake through Lac Vieux Desert, called there Lake of the Desert, to Captain Cram's monument, arbitrarily marking as the head proper of the Montreal, the junction of two forks of the east branch thereof, so, in that regard Mr. Burt's action was simply ministerial. Furthermore, it was provided for within the period when the Wisconsin line was *expressly* conditional, that is within the practically two-year period which Wisconsin had in which to secure the ratification of the line by Michigan.

The bill then (page 34), recited the entire description of Wisconsin's claimed boundary as set out in her constitution,

adopted in 1848, and still remaining in force, and showing that there is serious conflict between Wisconsin's claim to the boundary as set out in her constitution and Michigan's claim to the boundary as set out in her constitution and as the same has been claimed by Michigan in some of its parts at all times. It is, however, distinctly shown that Wisconsin by her constitution claims the boundary through Green Bay *to run with the Michigan boundary* and likewise agrees with the Michigan boundary by following the main channel of the Menominee River to the Brule River.

By this the bill is made to assert that Wisconsin, through her constitution, has yielded to Michigan's boundary through Green Bay and the Menominee River and Michigan has been permitted to understand that Wisconsin made no claims to any of the Michigan Islands in either of those waters, though, not withstanding that fact, Wisconsin has possessed them.

Montreal River Section.

As to the Montreal River Section of the boundary, that is from the month of the Montreal River to the head of Lake Brule the complaint details the grant to Michigan, and the readiness with which the boundary described in the grant could have been laid down, and the errors made in the report to the effect that it could not be laid down, and the further error made in the report that the boundary recommended by Captain Cram was substantially the same and would leave to Michigan and Wisconsin, respectively, practically the same amount of territory that was intended by Congress in describing the Michigan boundary, as well as the facts that caused Michigan to rest in the belief that the line was substantially the same and that Wisconsin made no claims to any land within the rightful Michigan boundary, and thus the delays in claiming rights recently found to exist but concealed from view because of those misrepresentations and mistakes have been fully explained and justified.

The Menominee River Section.

As to this section the complaint (page 36) outlines the claims of the respective parties and we have shown that Michigan has repeatedly asserted that the boundary was along the main channel of the river, while Wisconsin's constitution has asserted the same. It is shown that many islands on the Michigan side of said main channel have, as a matter of fact, been surveyed by the government in connection with the surveys in Wisconsin, but that such fact was unknown to the officials of Michigan until within the last three years.

These allegations the plaintiff claims the right to support, and it can support the same by much oral and other testimony. Further in regard thereto it is alleged and it likewise appears by both reports of Captain Cram that it is practically impossible to know where the main channel of the Menominee River is without a minute survey thereof and it is important to the interests of both states, for various reasons including questions of jurisdiction, that that line should be surveyed and that it never has been surveyed.

The Green Bay Section of the Boundary.

As to this section of the boundary it is shown by the bill of complaint that the line as described in the Wisconsin act agrees with or is made to follow the Michigan boundary, and it is also asserted that the boundary through Green Bay is described in Wisconsin's constitution to accord with the boundary described in Michigan constitution, but that, nevertheless, Wisconsin lays claim to and exercises possession over a large number of named and other islands in Green Bay that are on the Michigan side of the most usual ship channel referred to in Michigan's boundary description; that is the most usual ship channel of Green Bay as it existed in 1836.

It is alleged that said boundary line never has been surveyed and that it is important that it should be.

With the existing extensive differences in the various parts of said boundary line as shown, it is alleged in the bill (page 39) that Michigan has made two separate attempts to have Wisconsin join in an amicable adjustment of the differences existing, one in 1908 and the other in 1921, but that in each instance Wisconsin refused to join in such an adjustment.

ARGUMENT.

Plaintiff therefore asserts that by the complaint it is alleged and shown:

1. That Michigan holds the prior grant to all the territory in dispute.

2. That the boundary of Michigan's grant was and is capable of definite and positive location in all points where the same remains in dispute.

3. That there was gross error on the part of the Federal Government officials in erroneously reporting important facts in regard to the location of the boundary and in reporting that the boundary as described in the Michigan act could not be laid down in the field, and in asserting that the recommended boundary was substantially the same as was intended by Congress in the grant to Michigan and would give to each, Michigan and Wisconsin, the same amount of territory as was intended by Congress in describing the boundary in the Michigan act.

4. That said errors and misrepresentations were emphasized by the publication of a map, on authority of the territorial legislature of the State of Wisconsin, which erroneously represented the geographic conditions, and aided in misleading the engineer Cram who so reported that the Michigan line was an impossible line.

5. That in all dealings on the part of Michigan that have had to do with that line, Michigan has been

misled by the said false reports and mistakes of the said representatives of the Federal Government and the said legislature of the Territory of Wisconsin.

6. That Michigan never has in any way directly acted so that she could be said to have assented to, or acquiesced in, the wrongful claims of Wisconsin to the portions of the territory now in dispute, or any part thereof.

7. That Michigan has repeatedly reasserted her claims in a positive manner to considerable portions of said disputed territory, so that she could not possibly be said to have acquiesced in a claimed right of Wisconsin thereto, and Michigan has, in every instance where its rights have been transgressed, asserted those rights immediately on learning of the transgression thereof.

8. That a large portion of Michigan's boundary through Montreal section thereof and that through the Brule and Menominee Rivers and through the waters of Green Bay, has never been marked.

9. That there are witnesses to testify as to certain features of the complaint (Complaint, page 38).

10. That it is important to both states from a jurisdictional standpoint, as well as from territorial and taxation standpoints, that such line be established.

11. That Michigan has twice not only invited but urged Wisconsin to join in proceedings for an amicable adjustment of said line, but Wisconsin has in each instance refused absolutely so to do.

Therefore, we submit that the bill of complaint states a cause of action as to each and every section of said disputed boundary.

Defendant's Claims as to the Right to Use Public Documents, in Connection With the Complaint, in Placing a Construction Thereon.

1. Plaintiff claims that a motion to dismiss an action must rest entirely on the allegations of the Complaint, unless it *conclusively* appears that, by the use of evidence of which the courts take judicial notice, all the evidence on the subject is before the court, and by it essential elements of the complaint are contradicted.

We take it, from the authorities cited by defendant, that we are in agreement upon this point.

In addition we cite *Sec. 1343 Streets Fed. Eq. Practice, Vol. 2, page 814,* where it is said:

> "As a motion to dismiss is a summary method of proceeding, the ground on which the motion is based must be both manifest and conclusive."

Therefore, unless it is *manifest* that the public documents referred to by defendant furnish *conclusive* proof to defeat some material allegation of the complaint, such documents do not effect the purpose for which defendant offers them.

In none of the cases cited by defendant was a motion to dismiss granted except where it clearly appeared that all evidence was before the court, or where the complaint failed to state a cause of action and the plaintiff declined to amend.

2. Plaintiff claims that none of the documents cited, or referred to by defendant in its brief, contradict any essential allegation of the complaint, and that it in no way appears that offered evidence of which the court may take judicial notice constitutes all the evidence that may be produced upon the point involved, but that, on the contrary,

the showing is that there is much more documentary evidence, of which the court may take judicial notice, than that referred to by defendant, much documentary evidence of which the court may not take judicial notice, and oral evidence which plaintiff expects to produce in support of the complaint, and that such evidence is so extensive and of such a nature that it is impractible, if not impossible to present the same upon a hearing on a motion.

For these reasons, and because the complaint is shown to state a cause of action, this motion should be denied.

Defendant's Reasons For Asking That the Case Be Dismissed, As Set Out In Its Motion.

Under the general alleged reason that the complaint and action should be dismissed, because that:

> "From an examination of the complaint and a consideration of those matters of which the court takes judicial notice, * * * it affirmatively appears that the complaint fails to state a cause of action,"

the defendant makes subdivisions (Motion, page 2), as follows:

> "1. Because the records and proceedings so referred to contradict the allegations of plaintiff's complaint in such material respects that when the true facts are substituted for such contradicted allegations it affirmatively appears that the plaintiff has no claim whatsoever.
>
> 2. That upon consideration of the same matters, it appears that as to any claims which may at any time have existed, assuming the allegations of plaintiff's complaint to be true, it affirmatively appears that the plaintiff is now barred from asserting them by reason—
>
> (a) Of long acquiescence in the boundary as claimed by the defendant.

(b) That within the rules laid down and the decisions made by this court, the plaintiff's claim is stale.

(c) That failure to assert the claims now made has resulted in the creation of rights and interest in reliance upon the present boundary, which, if now disturbed, would result in hardship, inconvenience, confusion and injury to persons not now parties to this proceeding, as well as to the defendant.

(d) That within the familiar rules of equity applicable to actions of this kind, relief at this late date should be denied."

By Defendant's Brief.

The same general reason is alleged (pages 1 and 2) but the defense of

Acquiescence

is emphasized, and is given practically entire attention, and we have therefore concluded to give that element of the defense (Subdivision a of reason 2 above) our first consideration.

In this connection we reassert that under the topic of "Issues Presented by Motion" (Defendant's Brief, pages 2 and 3), Michigan's proposition, or theory of the case, is misconstrued, and Michigan does not claim there was any *"ambiguity"* or *"uncertainty"* in the description of its boundary as worded in its grant. Michigan does claim, as in defendant's brief stated (page 2), that by reason of Michigan's prior grant, in connection with becoming a state, her rights are paramount to those of Wisconsin in all instances where Wisconsin's claimed boundary conflicts with that of Michigan.

The defendant states, as its position upon the law (Brief, pages 2 and 3) that:

> "The motion of the State of Wisconsin rests primarily upon the well established principle that long continued acquiescence by the complaining state in a boundary line not conforming exactly to the description of such boundary line as contained in the grant to such state, and long continued exercise of jurisdiction over the territory in question by the defendant state, coupled with a general recognition and acceptance of such boundary line, operates to validate it and vest in the defendant state from the beginning a valid title by prescription or a right in the nature of a prescriptive right, and that the right so established and recognized takes effect, not as an alienation of territory, but as a definition of the true or ancient boundary."

The plaintiff takes this occasion to express its disagreement with the claim that there is any such a broad general rule, or that there is any such a rule applicable as against a state, and to claim that the authorities cited do not support such a claim, and, further, to claim that if there was such a broad general rule it would not support this motion because the allegations of the complaint, or the allegations of the complaint taken in connection with other matters before the court, serve to keep this case without the provisions of such a rule.

In view of the defendant's stated position upon its defense of *acquiescence* the

Plaintiff's Claim

in this regard should be stated, and the same is:

1. That, as a general rule, acquiescence, and other kindred defenses such as laches and the statute of Limitations, are not available as against an action by a state, and such a claim is not available as a defense upon the showing now before the court in this case.

2. That if the defense of acquiescence is ever

available as against a state, such acquiescence must have been express and positive, by proper authorities, and with a full knowledge of the facts as to the matter in which acquiescence is claimed, in other words, that, as against a state, *if acquiescence is ever a proper defense, it is such only when so made as to practicably constitute an express compact,* or contract.

3. The defense of acquiescence is essentially a matter of evidence, and is not available in support of such a motion as this, unless it conclusively appears to the court that all the evidence available, upon the material allegations of the complaint, is before the court.

4. In the case at bar the line of Michigan's grant can positively be laid down; no compact or express contract has been made to change it, and Michigan has never submitted to Wisconsin's claim, knowing or having a reason to believe that it infringed on Michigan's rights, and Wisconsin has always known that her claims were conditional on Michigan's right to have the line of her boundary established.

What is "*acquiescence*" in the sense of the word as applied to its use as a defense?

The Standard Dictionary gives its meaning in *law* as:

> "Consent inferred from silence, or from omission to dissent *when circumstances require an expression of dissent.*"

Bouvier's Law Dictionary says of this word:

> "The acts of acquiescence which constitute an implied election must be decided *rather by the circumstances of each case, than by any general principle.*"

And again:

> "When a party is bound to elect between a paramount right, and a testamentary disposition, his acquiescence in a state of things, which indicates an election, *when he was aware of his rights,* will be *prima facie* evidence of such election."

In *1 Corpus Juris, page 906,* it is said:

> "The word implies assent, or consent, acceptance, or approval, *the term also implies knowledge.*"

In Rap. & Lawrence's Law Dictionary, quoted in *Words & Phrases, Vol. 1, page 110,* it is said:

> "Acquiescence is *where a person, who knows he is entitled to impeach a transaction or enforce a right,* neglects to do so for such a length of time, that, *under the circumstances of the case,* the other party may fairly infer that he has waived his right."

Thus *knowledge* of one's rights in an *essential* element of acquiescence in a transgression thereof.

There are a very large number of cases where the word "acquiescence," as referring to a defense, is defined; all in harmony with the definitions above quoted, and plaintiff claims they fully support its position in this case, and that to entitle the defendant to plead "acquiescence" as a defense, and much more in order to support its motion on such a claim, it must appear, that the act relied on is definite and positive, and is by a person having authority to act, and who acts or fails to act while having knowledge of the rights which it is claimed he has forfeited by such action or inaction; that as to a State, in addition to the above required elements, circumstances relied upon must be direct action, and cannot be implied by inaction. Also, that the condition of active consent must be continuous for a long period of time, uninterrupted by acts of dissent.

In support of this position we cite:

2 Pomeroy's Eq. Jur., Sec. 817.
1 Am. and Eng. Enc. of Law, page 570.
Mathews v. Murchison (U. S.), 17 Fed., 760, 766.
Pence v. Langdon, 99 U. S., 578, 581; 25 L. Ed., 420.
Wagg v. Herbert, 92 Pac., 250, 266; 19 Okl., 525.
Royce v. Carpenter, 80 Vt., 37; 66 Atl., 888, 892.
Words & Phrases, 2nd Series, Vol. 1, page 63.

In *2 Pomeroy's Eq. Jur., page 906,* referred to and quoted in *1 Corpus Juris, page 906, note 18-a,* it is said of "acquiescence" that *in order to cut off a party's title or bar a legal remedy:*

> "The acquiescence must be *with the knowledge of the wrongful acts themselves, AND OF THEIR INJURIOUS CONSEQUENCE. It must be voluntary,* not the result of accident * * * and it must last for an unreasonable length of time." (Italics are ours.)

This authority is fully decisive of the question as applicable to this hearing for it clearly appears that at all times, after the grant to Michigan in 1836 up to 1906, Michigan acted upon false representations as to her rights, and without knowledge of the facts that any rights of Michigan were transgressed by the actions of Wisconsin which it is now claimed Michigan ratified by acquiescence. Not one act of Michigan has been pointed out where Michigan acted upon any feature of the transaction, *with KNOWLEDGE* that such action was not in accordance with its just rights, or with *KNOWLEDGE that that act* of the Federal Government or of the State of Wisconsin, now claimed to have been acquiesced in, *were wrongful acts themselves,* or with *knowledge* of their *injurious consequences.*

While defendant claims by its brief, that Michigan has acted regarding Wisconsin's claimed boundary, knowing of such claim, it is not anywhere successfully shown that Michigan acted in that regard knowing that Wisconsin's

claim transgressed Michigan's rights, but on the contrary, Michigan's actions have been based on the false representations that Wisconsin's claimed line was not materially different from Michigan's line, and would give to each, Michigan and Wisconsin, substantially equal amounts of territory as was intended by the description of the Michigan line; furthermore, none of the cited acts of Michigan were of such a nature, or under such circumstances, as would have amounted to acquiescence. Still further, Michigan knew that the claimed Wisconsin boundary was subject to the ratification of Michigan, and that it was *expressly* not binding at any place where it came in conflict with Michigan's line, and Michigan never, until 1906, had any reason to believe that the Wisconsin claimed line included any territory within the Michigan line. Until Michigan so knew there was no call for her protest, and she could not *acquiesce* in a wrong of which she had no knowledge. As soon as Michigan learned of Wisconsin's trespasses she acted in her own defense and positively made her claims known to Wisconsin.

Furthermore, Michigan's acts now claimed to have been acts of acquiescence, so far as they had to do with the Wisconsin line, having been brought about by misrepresentation, were not *voluntary* acts, and, therefore, for this reason, under the authority cited, *they are not available to bar a legal remedy.*

In *1 Am. & Eng. Enc. of Law, page 570,* it is said:

> "Asquiescence is *where a person who knows that he is entitled to impeach a transaction or enforce a right* neglects to do so for such a length of time *that under the circumstances* of the case the other party *may fairly infer* that he has waived or abandoned *his right.*"

We have used italics to emphasize our position that the act referred to cannot be "acquiescence" unless the acting party *knows* that it is not in accord with his rights.

In the cited case of *Mathews v. Murchison, 17 Fed., 760, 766,* the court held that "acquiescence, that is 'assent'" *is tantamount to an agreement.* It is an implied contract, and *it requires for its validity,* the power to contract.

In the cited case of *Pence v. Langdon, 99 U. S., 578, 581,* it is said:

> "Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the *imposition* practiced on him. It is not enough to show that he might have known or suspected it from data within his reach."

In the same case it was also said:

> "It was not enough to charge the plaintiff with knowledge of the malcharacter of the transaction, that the language used was such as might have caused some persons to suspect. He might, in view of previous friendly relations, have no suspicions of bad faith, and might naturally regard expressions as inaccurately used, rather than put upon them a construction which would show bad faith on the part of the defendant, which he had no reason to anticipate."

This is particularly applicable to the case at bar.

The line of Wisconsin's grant was made conditional on Michigan's ratification within two years. It had been represented as being as nearly the same as the Michigan line as could be laid down, and Wisconsin had not received Michigan's ratification, or even asked for it. Under such circumstances Michigan had the right to rest secure in the belief that Wisconsin would not claim any territory within Michigan's boundary without first securing Michigan's ratification, and, Wisconsin not having asked that ratification, Michigan had the right to believe that Wisconsin was not claiming any property within the Michigan boundary.

The court there also said:

> "If the jury believe that the plaintiff had no actual knowledge or belief that defendant had put his own stock upon them, until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient."

From this holding that repudiation is not required until knowledge of the misconduct is brought home to the parties sought to be charged with acquiescence, it is equally true acquiescence cannot be charged until knowledge is brought home to him, because a party cannot acquiesce in a wrong of which he has no knowledge.

The court there also further says:

> "*Acquiescence and waiver are always questions of fact. There can be neither without knowledge.* * * * One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not wilfully shut his eyes to what he might readily know and ought to have known."

As the allegations of the complaint clearly show that the plaintiff acted in this matter as soon as it had any knowledge of the defendant's wrongful action and as soon as it had reason even to suspect any such wrongful action, there was no acquiescence, but exactly the contrary.

In the same case the court further said:

> "The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant."

So, in the case at bar, the burden of proving that the plaintiff acquiesced, one element of which must be that

plaintiff had knowledge of the wrong, rests upon the defendant, the State of Wisconsin, there being nothing in the complaint from which acquiescence can be inferred, but, on the contrary the bill having specifically shown that Michigan had no knowledge of Wisconsin's transgression, and thus countered an anticipated charge of acquiescence.

In the cited case of *Wagg v. Herbert, 92 Pac., 250, 266; 19 Okl., 525,* it is said:

> "When a party, *with full knowledge,* or at least with sufficient notice or means of knowledge, of his rights, *and of all material facts*, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized or freely abstains for a considerable length of time from impeaching it, so that the other party is to be reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity."

The reverse condition of facts being shown by the present bill the law applies in reverse order and Michigan's delay without knowledge was not acquiescence.

In the cited case of *Royce v. Carpenter, 80 Vt., 37, 66,* it is said:

> "'Acquiescence' in the wrongful act of another, such as will operate to preclude equitable relief, must be not only with knowledge of the wrongful acts, but also of their injurious consequences, and the same must last for such an unreasonable length of time as to make it inequitable to enforce the remedies of equity against the wrongdoer."

In the cited authority of *Words & Phrases, 2nd Series, Vol. 1, page 63,* numerous authorities are cited in support of the there given definition of acquiescence *and of the fact that it implies knowledge,* as follows:

> " 'Acquiescence' and 'waiver' are always questions of fact; there can be neither without knowledge. *The terms import this foundation for such action.* One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough; there must be knowledge of the facts which will enable the party to take effectual action. Nothing short of this will do. 'Acquiescence' exists where a person, who knows that he is entitled to impeach a transaction or enforce a right, neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer he has waived or abandoned that right."

We believe the authorities above cited applicable to the alleged "acquiescence" of plaintiff, effectively defeat the defendant's position that, by the complaint, and the documents cited by defendant claimed to be in conflict therewith, such a situation is presented as to show any such acquiescence as would amount to a defense upon a hearing, and that in any event, no such a showing is so *conclusively* made as to warrant the dismissal of the action on the motion; as to preclude the plaintiff from the rights and privilege of presenting all the evidence there may be in support of the complaint.

Laches, Prescription, Etc.

The other divisions of defendant's reasons for asking that the bill be dismissed, which we have classified as subdivisions b, c, and d, are simply varied claims of "laches," named as stale claims, and failure to assert claims, until other rights have intervened.

What we have said and the authorities we have cited and quoted from, in support of plaintiff's claim that there was no "acquiescence" on its part, are applicable with practicably equal effect as applied to the defense of Laches, and as to that we say not only that there is now before the court no showing of laches, not to mention a *conclusive* showing such as would be required to support the present motion, but the nonexistence of both laches and acquiescence is affirmatively shown by the complaint.

We feel that we can proceed to a citation of other authorities upon the subject of laches and its kindred defenses, and a discussion of defendant's cited authorities, on the theory that none of the public documents referred to in defendant's brief have the effect, as claimed for them, of contradicting any of the essential allegations of the complaint; especially of *conclusively* contradicting the same, as would be necessary in support of this motion, and leave a discussion of the effect of those documents for a later portion of this brief.

In support of our position that there is no showing of Laches, Acquiescence, or other kindred defenses existing in this case, and further that no such defenses would be applicable as against the plaintiff, a sovereign state, especially in a case of this nature, we will not only review defendant's cited authorities upon those points, but cite other authorities as follows:

Lindsay v. Miller, 6 Peters, 666; Book 8, L. Ed., 538.
Commonwealth v. First Pres. Church, 8 Ohio S. C., 298; 22 Am. Dec., 718.
Pearson v. Arledge, 23 Am. Dec., 145.
Jourdan v. Landry, 4 Howard, 169.
Gibson v. Chouteau, 13 Wallace, 90.
Oaksmith v. Johnson, 92 U. S., 343.
U. S. v. Texas, 162 U. S., 867.
Oklahoma v. Texas, 41 Sup. Ct. Rep., 420.

Marine Railway and Coal Co. v. U. S., 66 L. Ed., page 35 ,Nov. 7, 1921.
Polaski County v. State, 42 Ark., 118.
Mayor of Kingston v. Horner (Cowper, page 102).
Rice v. Minn. & N. W. R. Co., 66 U. S., 358, 380.
Stein v. Bienville Water Supply Co., 141 U. S., 67.
Lott v. Brewer, 64 Ala., 287.

Cases cited by defendant:

Louisiana v. Mississippi, 202 U. S., page 1.
Virginia v. Tennessee, 148 U. S., 503.
Indiana v. Kentucky, 136 U. S., 479.
Missouri v. Kentucky, 11 Wallace, 395.
Rhode Island v. Massachusetts, 4 Howard, 591.
Boyd v. Graves, 4 Wheaton, 513.
U. S. v. Stone, 2 Wall., 525.
Maryland v. W. Va., 217 U. S., 41.
Belding v. Hebard, 103 Federal, 532.
Arkansas v. Tennessee, 246 U. S., 158, 174.
Moore & McFerrin v. McGuire, 142 Federal, 786.
Stevenson v. Fain, 116 Federal, 147, 155.
N. Carolina v. Tennessee, 235 U. S., page 1.

In *Lindsey v. Miller* above cited, it is said in the syllabus, which seems to be the correct synopsis of the decision:

> "It is a well settled principle that the statute of limitations does not run against a state."

There the plaintiff had regularly received a land patent from the State of Ohio shortly before the commencement of the action. The defendant claimed under an illegal patent that had been issued by Virginia and under which possession had been held for thirty years, but possession was not allowed to control against the state which had rightfully given the patent, notwithstanding the possession.

In the cited case of *Commonwealth v. First Presbyterian Church, 8 Ohio, 298 S. C.,* it is distinctly and clearly held that the statute of limitations does not run against the sov-

ereign power in the absence of express condition to that effect. In that case we find a thorough analysis of the underlying reasons why statutes of limitation and the kindred defenses of laches, etc., do not obtain against a state or the United States.

It is there said the separation of the Sovereign power from the statute of limitations rests:

> 1. On the supposition that the Sovereign is too busy or too much occupied to pay particular attention to his rights, as an individual can.
>
> 2. That no negligence or laches can be imputed to the government or sovereignty of a country.

In the opinion in this case citation is made to the case of *U. S. v. Hoar, 2 Mason, 314,* in which quotation is made from Judge Story, as follows:

> "The prerogative right of a King in relation to acts of limitation in England, is, in fact, nothing more than a *reservation,* or *exception,* introduced *for the public benefit,* and is *equally applicable to all governments,* to protect its right, unless the construction be clear and indisputable upon the text of the act."

This Cincinnati case, discussing the underlying principles of the statute, and tracing the exemption of the Sovereign from its operation, from its origin in England, says:

> "The principle that the Sovereign power of a state is not bound by the statute of limitations without express words, *obtained in the earliest stages of the common law, and has descended to this day.* This rule is *sometimes* of odious application; but *it is adopted as incidental to sovereignty, and necessary to preserve* against *negligence,* or cupidity, those *rights which the state has acquired or retained.*"

There is a very obvious reason why such a doctrine should equally apply to a sovereign republican government

such as ours, and that is, that with continuing changes of administrative officials items that may have come to the attention of one administration may be overlooked and not be brought to the attention of the next administration, so that the people, the real sovereigns, ought not to be deprived of their legal rights under such circumstances.

To the same effect, and a holding that "Neither time nor the statute of limitations runs against a state, we cite:

Commonwealth v. McGowen, 7 Am. Dec., 737.
Nimmo v. Commonwealth, 4 Am. Dec., 488.
Hoey v. Furman, 44 Am. Dec., 124.
Saunders v. Commonwealth, 10 Gratt., 496.
Sevasser v. Washburn, 11 Gratt., 577.
U. S. v. Hoar, 2 Mason, 311.
French v. Commonwealth, 27 Am. Dec., 613."

In *Pearson v. Arledge,* above cited, it is said:

> "The statute of limitations does not run against the state nor the United States."

In *Jourdan v. Landry, 4 Howard, 169,* where defendant sought to hold title to lands by possession for a long period of years, a large portion of which was while the lands belonged to the United States Government, the court said:

> "The possession of any part of these back lands, anterior to this survey cannot be set up as a defense under the laws of Louisiana, because the lands belonged to the United States, and those persons in possession were trespassers."

In the case of *Gibson v. Chouteau,* in a head note by Mr. Justice Field, it is said:

> "Statutes of limitation of a state do not apply to the state itself unless it is expressly designated or the mischiefs to be remedied are of such a nature that it must necessarily be included, *and they do not apply to the United States."*

In a foot note to the same case it is said:

> "A statute of limitations does not run against the state nor the United States so as to give title to one holding lands belonging to either, citing *Pearson v. Arledge, 2 Bailey, 401; 23 American Decisions, 145; Union Mill Mining Company v. Ferris, 2 Sawyer, 176, S. C.*"

In the case of *Oaksmith v. Johnson* above cited, it is held that where the legal title is in the United States the statute of limitations raises no bar to the action and is not available as against the government.

In defendant's cited case of *Louisiana v. Mississippi, 202 U. S., page 1,* cited on the claim that long possession gives title, the facts are, as appears from a reading of the case, that Louisiana had the prior grant. The boundary as therein described could be construed in accordance with the Louisiana claim. Louisiana had been in control of the disputed area, under her claim, for more than fifty years, with Mississippi's assent. The adverse possession, lapse of time, and assent were considered as having served to place a construction on the *otherwise questionable proper location* of the boundary. There it was purely a question of locating the original line and possession was a strong element in so doing.

In defendant's cited case of *Virginia v. Tennessee, 148 U. S., 503,* the facts as they appear are that, after Tennessee became a state, commissioners were appointed by each Virginia and Tennessee, through which, in 1802, a compact was entered into, agreeing upon and settling the boundary line. This compact was ratified by the legislatures of both states. The holding is that the *compact* which has been assented to, is binding as fixing the original line.

In defendant's cited case of *Indiana v. Kentucky, 136 U. S., 329,* the court recited as facts that when Kentucky became a state, its jurisdiction extended to the north bank of

the Ohio River, and that the channel of the river then ran north or Green Island. Kentucky based her defense on the grant and long continued possession to what she claimed was the line of the grant. There was much evidence on the subject of the location of that line originally, and their long continued possession was found to be the best evidence as to where the line originally was. After deciding, upon the evidence, that the boundary of Kentucky's original grant was the same as her claim and was in accord with her long continued possession, the court said:

> *"Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the actions of the forces of nature upon the course of the river."*

All of defendant's quotations from the decision in that case must be considered in connection with the facts there before the court and it was simply a question of establishing the original line, in which possession played a part in support of, but not in conflict with the claimed line of the grant. The evidence was conclusive that Kentucky had claimed the right and had exercised jurisdiction, in accordance with her claims, from a time previous to Indiana's becoming a state. The court, in its decision, used this language,

> "Such acquiescence in the assertions of authority by the State of Kentucky; such omission to take any steps to assert her present claims by the State of Indiana, can only be regarded as a recognition of the right of Kentucky, *too plain to be overcome, EXCEPT BY THE CLEAREST AND MOST UNQUESTIONED PROOF."*

There was no proof of any other line, and the fact of Kentucky's long possession was cited in support of defendant's claim and as opposed to the plaintiff claim; the plaintiff having had the burden of proof. There was no application of the question of time on the theory of its defeating the title or changing the original line but it was used as evidence of the location of the original line.

The last part of the quotation above, "except by the clearest and most unquestioned proof," is instructive and shows clearly that even against a long continued possession clear evidence of the original line would prevail. Applying that essential construction to the case at bar, the clear and indisputable evidence of the line of the Michigan grant must prevail over any other line, claimed to have been established by possession.

In the defendant's cited case of *Missouri v. Kentucky (11 Wall., 395)*, the language quoted in defendant's brief at page 79 was used in the discussion of claims of the respective parties because of claimed possession, and it is a fact that in some cases where it is impossible to definitely locate the original line by other positive evidence, the question of occupancy has been used to evidence its probable location. There the court found the boundary of the first grant to Virginia to have been the Mississippi River, and that when Kentucky was carved out of the Virginia territory, its western boundary was the Mississippi River. Likewise Missouri's eastern boundary was the same river. Then it recites an agreement of authorities that when a river is described as a boundary, without other specifications, the middle of the main channel of the river is the boundary.

Much evidence, oral and documentary, was considered, and it was found that the middle of the main channel of the river at that point was West of the Wolf Island in question, and that Wolf Island was therefore on the Kentucky side of the main channel and was a part of Kentucky. In discussing the evidence by which it was determined where the main channel was at the earlier date, the court stated that Kentucky had exercised possession and that Missouri's claim to possession was not established. However, the real question in issue there was to establish the original line and there was no semblance of a holding that the line of the original grant was changed by possession, acquiescence or laches, but on the contrary the possession was in accord wtih the other evidence by which the line was determined.

At page 81 of defendant's brief, the case of *Virginia v. Tennessee* is again cited and quoted from. By the quotation reference is expressly made to a boundary,

> "*which has been run out, located and marked* upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years,"

and it is there further said that the line so established *takes effect as a definition of the true and ancient boundary.*

The case is not in point in the case at bar because Michigan's boundary has never been run out and it has never been claimed that it had been run out, and Wisconsin's boundary, insofar as it has been run out, was conditional at the time it was run and was not in accord with Michigan's prior grant, and the condition in that boundary has never been removed and there has never been a time when Michigan was called upon to recognize it as a definite boundary, free from condition, and Michigan never has so recognized it.

Defendant's cited case of *Boyd v. Graves, 4 Wheat., 513,* cited in the case of *Virginia v. Tennessee* last referred to, held simply the fact that where two proprietors of land made a parol agreement to employ a surveyor to run their dividing line, and that it should thereby be ascertained and settled, and with both parties present the line was surveyed, the adjustment was held to be conclusive. Referring to the last cited quotation of defendant from the case of *Virginia v. Tennessee,* we call the court's attention to the fact that in that case the final decision rested upon the fact that commissioners had been appointed by each state to settle the line and the commissioners agreed thereon and their agreement was satified by the legislatures of both states and the holding of the court was that the compact which had been assented to was binding as fixing the original line, and there was no holding, that upon the facts in the case, that any number of years of acquiescence in a line that had not actually been marked out by the parties and agreed

upon would overcome the establishing of the original line where the same could be established by definite evidence.

In support of its decision in the cited last mentioned case of *Indiana v. Kentucky*, the court cited there also the cases of *Stone v. the U. S., 2 Wallace, 525.*

In the case of *Stone v. U. S.*, it was held that:

> "A boundary between the lands of an Indian tribe and those of the United States, *surveyed by the parties,* and acquisced in for more than thirty years, cannot be made the subject of dispute, by references to courses and distances called for in patents under which the parties claimed."

In that case a survey provided for by Congress was participated in by both parties and agreed to, and both parties recognized it for thirty-four years as the line of the boundary. The effect of that case was not to establish title by prescription, but to use the fact of possession as evidence that the line agreed upon was so located. It is in no way applicable to the present case where the parties have never agreed upon a line or upon the location of a line.

Defendant's cited case of *Rhode Island v. Massachusetts, 4 Howard, 591,* is a case frequently cited, and the court is undoubtedly very familiar with the principles there settled. We do not, however, agree with counsel for defendant that the case supports their position and therefore take the liberty of analyzing to some extent that very extended opinion in that case.

In that case the decision was made to rest upon two propositions (page 635):

> 1. The construction of the Massachusetts Charter.
>
> 2. The question as to whether or not there was a mistake made by the Commission in locating the Woodward and Saffrey station, or monument, a joint

commission of the two states having agreed upon the location of the monument, and of the boundary line.

The question as to whether long possession, alone, could defeat a prior grant did not enter into the decision, as the possession had been in accordance with a reasonable construction of the grant and also following an agreement as to the line.

Long delay, while out of possession, *in asserting a claim for redress on account of a claim that a settlement* of the line, *by a joint compact, was brought about through mistake,* was mentioned in the decision as supporting the probability that there had been no mistake in the making of such compact, and in connection therewith it was also said the burden of proving the mistake was on the plaintiff, and there was no proof.

On the whole, as bearing upon the settlement of state boundary disputes in general, and in some respects on the instant case, the quoted case is an interesting one.

In 1629 Massachusetts received her Charter from the Crown, and therein her southern boundary was described as a line:

> *"Three miles south of the Charles River, and the most southerly part thereof."*

In 1638-1639 and 1642 Massachusetts surveyed that boundary and designated it by the Woodward and Saffrey station which was set *three miles south of the southermost part of one of the tributaries of the Charles River.*

In 1663 the grant to Rhode Island designated her northern boundary as

> *"the southerly line of Massachusetts."*

In 1664 a line was run by Commissioners from each colony. Their return was accepted by the General Court of Massachusetts, and ordered to be recorded.

The court says, "It may fairly be presumed that the report was also accepted by Plymouth" (then occupying R. I.'s position.)

Much contention arose over the line as settlement of the country proceeded, and

> "to adjust these disputes, in 1702, Commissioners were appointed by the two Provinces *to ascertain the boundary line.*" (Italics in these quotations are ours.)

This Commission took observations at different points called for in the Woodward and Saffrey line, as first marked by Massachusetts, and *it was found that Massachusetts had made grants and established towns south of the line.*

On account of conflicting grants serious difficulties occurred between the border inhabitants of the two states.

It is recited that:

> "After much correspondence and legislative action on the subject by the respective parties, it was finally agreed to appoint commissioners."

Again in October, 1710, the Rhode Island Legislature appointed a Commissioner to treat with a Commissioner from Massachusetts.

These Commissioners met and agreed to the Woodward and Saffrey line, and the agreement was signed by the Commissioners from both states.

In 1711 this agreement was sanctioned by Rhode Island when it authorized the running of the line in pursuance thereof, and it was accepted and approved by Massachusetts.

In 1716 and 1717 Commissioners were appointed by Rhode Island to act jointly with Commissioners from Massachusetts to run the line, with *full power,*

> "for the final settling and stating the aforesaid line between said colonies * * * in the best manner they can, as nearly agreeable to our royal Charter as in honor they can compromise the same."

This joint Commission, October 22nd, 1718, signed and sealed an agreement,

> "that the stake set up by Nathaniel Woodward and Solomon Saffrey, in 1642, upon Wrentham Plain, be the station or commencement to begin the line," etc.

October 29th, 1718, this agreement was accepted by the General Assembly of Rhode Island, and ordered to be recorded and it was also accepted by Massachusetts.

A joint Commission was appointed to run the line in accordance with the last mentioned agreement.

This Commission reported its inability to find the Woodward and Saffrey stake, but located the place thereof, as described in the Commission, and located the line.

The contention of Rhode Island was that the line should be run at a point three miles south of the southermost point of the main channel of the Charles River, instead of three miles south of the southermost point of a tributary thereof.

The Court said (page 633):

> "The misconstruction of the charter, in going more than three miles south of Charles River, is earnestly insisted on by Complainant's Counsel. *IF THE WORDS of* the Charter *WERE CLEAR AND UNEQUIVOCAL in this respect, there would be great force in this argument. It would be decisive of this controversy* unless controlled by other facts and circumstances in the case."

After discussing the fact that *the Charter might be construed to mean a line three miles south of the southermost*

point of a tributary, and the fact that *the tributary might be called a part of the river,* etc., the court said (page 636):

> "The Complainant's Counsel rely mainly upon two grounds:
>
> 1. The misconstruction of the Charter.
> 2. The mistake as to the true location of the Woodward and Saffrey station.
>
> If the first be ruled against the Complainant the second must fall as a consequence. And, as regards the first ground little need be added to what has already been said. *The Charter is of doubtful construction, and may, without doing violence to its language, be construed in favor of or against the complainant. IN THIS VIEW the construction of the Charter by Massachusetts, assented* to by the old colony of Plymouth many years before Connecticut or Rhode Island had a political organization, *is an important fact in the case.* Plymouth was interested in restricting the lines to the calls of the Charter, for the line constituted the common boundary between the two colonies. *And as controversies had arisen respecting the boundary, and commissioners been appointed to settle it, the presumption is that the rights of both colonies were understood and respected in the establishment of the line. * * * IN THE ABSENCE OF PROOF THE PRESUMPTION IS NOT TO BE DRAWN THAT THEY SUPPOSED the line established was only three miles south of the river. Connecticut,* after the lapse of many years, *assented* to the line run from the Woodward and Saffrey station, as its boundary, *AND SO DID THE COMPLAINANT, in most solemn agreements,* as stated. *These proceedings conduce strongly* to establish a fixed construction of the charters, *favorable to respondent, UNLESS it be clearly made to appear they were founded on mistakes or fraud.*
>
> Fraud is not charged, and we have only to inquire into the alleged mistake.
>
> From the nature of this supposed mistake it is scarcely susceptible of proof."

The court, after further discussing the investigations made by the Commissioners, and the improbability of their having been mistaken, said:

> "The disputed is between two sovereign and independent states. It originated in the infancy of their history, when the question in contest was of little importance, and *fortunately, steps were early taken to settle it, in a mode honorable and just,* and one most likely to lead to satisfactory result. *There is no objection to the joint commission in this case,* as to their authority, capacity, or fairness of their proceednigs. An innocent mistake is all that is alleged against their decision.
>
> And, as has been shown, *this mistake is not clearly established, either in the construction of the Charter, or as to the location of the Woodward and Saffrey station.* But, if the mistake were admitted as fully and broadly as stated in the bill, could the court give the relief asked by the Complainant?"

In 1754, William Murray, then Attorney General, afterwards Lord Mansfield, was consulted by Connecticut, whether the agreement with Massachusetts respecting their common boundary, in 1713, would be set aside by a Commission appointed by the Crown, to which Mr. Murray replied:

> "I am of opinion, that in settling the above mentioned boundary, the Crown will not disturb the settlement by the two provinces so long ago as 1713. I apprehend his Majesty will confirm their agreement, which of itself is not binding on the Crown, *but neither province should be suffered to litigate such an amicable compromise of doubtful boundaries.*"

The court then, after dwelling upon the fact that *the agreement* had been allowed to stand unchallenged for forty-one years when that opinion was given, said:

> "*The possession of the respondent was taken, not only under a claim of right, but that right,* in the most

solemn form *has been admitted by the complainant* and by the other colonies interested in opposing it. *Forty years elapsed before a mistake* was alleged, *and since such allegation* was made nearly *a century has transpired.* If, in the agreements there is a departure from the strict construction of the charter, *the commissioners of Rhode Island acted within their powers,* for they were authorized 'to agree and settle the line between the said colonies in the best manner they can, as near agreeable to the royal charter as in honor they could compromise the same.' * * *

It is not clear that the calls of the charter were deviated from by establishing the station of Woodward and Saffrey. But if in this report there was a deviation, Rhode Island was not the less bound, for its Commisisoners were authorized to compromise the dispute. Surely this, connected with the lapse of time *must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718.* No human transactions are unaffected by time. Its influence is seen on all things subject to change. *And this is peculiarly the case in regard to matters which rest in memory,* and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, *long possession under a CLAIM of title* is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.''

Concretely speaking the case resolves itself into a statement of the law, that, the proper location of the described boundary having been a matter of doubt, to the extent that the charter might, with reason, have been interpreted in accordance with the claims of either party, and the parties having by mutual agreement come to a conclusion on the line, and the line having been located accordingly, and Massachusetts having, for one hundred forty years after such agreement, claimed title under her charter and said

agreement so construing it, with the full knowledge and *express* assent of Rhode Island, the latter could not have relief. And in so holding, it was recited that the claimed mistake in the agreement had not been supported by proof, and that the court would presume that the Commissioners who made the agreement understood the facts and circumstances.

It is significant, in this connection, that, although holding that, in a case of doubtful interpretation, like the location of the Massachusetts-Rhode Island boundary, the agreement, together with long possession pursuant thereto would establish the line, the court also, in speaking of the claim of Rhode Island that the Charter of Massachusetts had been misconstrued, and that, properly construed, the line should have been run as Rhode Island was contending (page 633), said:

> *"If the words of the charter were clear and unequivocal in this respect, there would be great force in this argument. It would be DECISIVE of this controversy, unless controlled by other facts and circumstances in the case."*

Applied, the court found the line not necessarily differing from the Charter, and further, even if it had been, there were the further facts that the two states had agreed upon a line as the boundary under the charter, and possession was held by Massachusetts for one hundred and forty years under claim of title through its charter as construed by that agreement.

Applying the last quoted statement by the court, to the instant case, it must be concluded that if the description of the boundary, as set forth in the Michigan Act of June 15th, 1836, is unambiguous, and should be interpreted in accordance with Michigan's claim, as to any portion of the disputed boundary, then, as to that portion, *such construction "is decisive of this controversy,* unless controlled by other facts in the case."

As to other facts in the case, there has been no agreement of parties; Wisconsin has not been in possession under claim of title. She cannot so claim, because her boundaries were expressly conditional, she accepted them as such, and the condition failed, so she never had title, or the right to claim it. Furthermore, *by the records* it is established that there was a mistake, that there were misrepresentations, and that only within very recent years have the true facts come to the knowledge of Michigan, bringing therewith notice that Wisconsin is possessed of lands that are within the clearly definable boundaries of Michigan. This testimony is not perishable.

Briefly comparing further the Massachusetts case with the case at bar, the court there stated that the river boundary contained an ambiguity. The language of the description might be interpreted to mean the northern most point of the main channel of Charles River, or the most northerly point of a branch thereof, considering the branch a part of the river. In the case at bar the language is explicit, the country being new and the details not definitely known to Congress, Congress made the description explicit by specifying the *main channel* of the Montreal River. This left nothing ambiguous. It simply remained to establish which was the main channel. According to the complaint that has never been done. When Captain Cram surveyed the east branch he was not authorized to locate any part of the boundary. That was on his second trip when he was to make a map for the information of Congress, and he did not survey or report the main channel, as alleged in the complaint.

Further commenting upon the language used in this decision as to the lapse of time, the court was speaking, not of the original grant, but of the fact that an agreement had been made practically one hundred forty years before the suit was commenced, *by which agreement between the states the line was established.* The court was considering the claim of Rhode Island, that there had been a mistake made by the commissioners, but the court said there was

no satisfactory proof of such a mistake, and in that connection said that the

> "lapse of time must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718."

And it was in connection with that state of facts, and not as bearing upon the right to change an unambiguous description in a grant that the court said:

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And *this is peculiarly the case in regard to matters which rest in memory,* and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary." (Italics are ours.)

That language was peculiarly applicable to that case where there was an attempt to establish a mistake of fact which was claimed had occurred one hundred forty years before, and for which there was no documentary proof and no other satisfactory proof, and where the description of the line was ambiguous.

In the case at bar there is no ambiguity, and the errors and misrepresentations complained of are matters of record which have been recently discovered to be errors and misrepresentations. So it is clear that that case in no way supports defendant's theory of acquiescence by Michigan, but, on the contrary, is a substantial authority in support of the plaintiff's theory that the unambiguous line in a direct and positive grant cannot be modified by lapse of time or possession, and that even against lapse of time, equity will relieve as against mistake or fraud. In the instant case the allegations of the complaint show the line

claimed by Wisconsin to have been marked and used because of both mistake and fraud; the misrepresentations, even though unintentional, effect a legal fraud.

Defendant's cited case of *Belding v. Hebard, 103 Fed., 532,* and *North Carolina v. Tennessee, 285 U. S., page 1,* are controversies over the same state boundary.

The first case is cited on page 84 of defendant's brief on the question of acquiescence, in consideration of

> "the *effect of acquiescence upon a line run and marked by the commission of each state,* which had long been recognized by both states as the true line, though, in fact, as afterwards discovered, it departed from the line called for in the grant which ought to have been pursued."

There the line of the grant was to follow the uppermost ridge of the mountain chain, which while naming certain peaks, left the location to be determined by engineering. Commissions from the two states ran and marked this line. It ran through an uninhabited wilderness. The notes of the survey and the report of the commissioners were not in evidence in this case. There was much conflict over the question *as to the location* by the commissioners of that portion of the line in question, including evidence of surveys made in Tennessee. The evidence being uncertain as to the location and marking by the Commission, the court considered evidence as to the probable location of the actual line of the grant, as relating to the agreed line, and established the line as it considered the evidence showed would most nearly harmonize the Commissioners' agreed line with the line described in the grant.

Speaking of the evidence on which a claim of *acquiescence* was based, the court said:

> "Evidence as to the reputation of the creek line of trees as marking the state line, and as to other acts indicating a recognition of that line as the actual line,

must be unavailing, *unless it is pursuasive enough to satisfy the legal mind that the State Commissioners ran, marked and adopted the Slick Rock Creek line as the true line,* although it is a radical departure from the description in the cession act.....; or such evidence must show such a long and continuous recognition by both states, of the creek line as to operate as an *estoppel to deny that it was the line run and marked and adopted in 1821.*''

Thus, *the original line of the grant must control,* unless *there is evidence to establish that the parties have agreed on another line.*

The court considered the evidence of Land Entries in the disputed strip, with the authorities of each state, and acts of surveyors on surveys authorized by the legislature of Tennessee.

The line of the original grant was sustained, the case seems to furnish no support for defendant's claim in the case at bar.

In the defendant's cited case of *North Carolina v. Tennessee, 235 U. S., page 1,* where the same line was in question, the surveyor's minutes and report of survey of the line as agreed to by the Commission, had been discovered and were in evidence, clearly showing that where there was a distinct break in the high ridge of the mountains the Slick Rock Creek line had been run and agreed to. No question of acquiescence was involved in this decision, except that the compact, or agreement to settle by the survey was an *express* acquiescence. The Court established the line in accordance with the compact which was made for the purpose of agreeing on the *original* line of the *grant.* No questions of other actions on the part of either state entered into or affected the decision.

We claim both these decisions as fish for plaintiff's net.

Another of defendant's cited cases to this same point is *Moore & McFerrin v. McGuire, 103 Fed., 787,* which involved the boundary line between Mississippi and Arkansas. The evidence established the fact that when Mississippi was admitted in 1817, and when Arkansas was admitted in 1836 an island in disputed was on the east side of the main channel of the river and was therefore a part of Mississippi and was not within the boundaries of the grant to Arkansas.

The island was included in the survey of Mississippi and part of it was included in the survey of Arkansas.

The complainant claimed title through a certificate of purchase from the United States, granted at an Arkansas Land Office, as of land in Arkansas. The lands in question had been sold for taxes under proceedings in Arkansas, through a decree in a court of equity of that state, to Complainant's grantor. Complainant also claimed possession under that purchase since 1898.

Part of the island had also been sold for taxes under proceedings in Mississippi, through which defendant claimed.

It was held that Mississippi retained jurisdiction according to her grant of Statehood which extended to the main channel of the river and included the Island (page 808).

There seems to be no feature of this case to support defendant's contention. On the contrary it is an authority for Michigan's claim of sovereignty to the line of her grant.

It is there also said (page 801) that acquiescence involves knowledge of a right. It was also said (page 798):

> "It has never been authoritatively determined by the courts of the United States whether a state can lose its territory by prescription and acquiescence."

The defendant's cited case of *Stevenson v. Fain, 116 Fed., 147,* involved the boundary line between North Carolina and Tennessee, and it was there held that a *compact* between

the states fixing the boundary was binding. Of course that is an extreme example of *acquiescence,* but it is not applicable to the case at bar for we have no compact.

Defendant also cites to the same point, *Arkansas v. Tennessee, 246 U. S., 158, 174.*

In this case there had been decisions in the courts of each state, in criminal and other cases, where the boundary was treated as being "a line along the river bed equidistant from the permanent and defined banks of the channel." In that case the original channel of the river had been completely changed by avulsion. Tennessee sought to have settlement by Commission but Arkansas refused to join. Action was brought to establish the boundary. It was held that the actions by the courts referred to did not constitute acquiescence, and that the boundary was along the center of the main channel as it existed prior to the avulsion.

There is nothing in this decision to sustain defendant's claim of acquiescence, but its effect is quite the reverse.

Maryland v. W. Virginia, 217 U. S., page 41, is another case that involved the establishing of a geographical point to determine the location of the line, and where a line intended to be the line of the prior grant, had been surveyed and marked, as the State line, and generally and extensively recognized as such for a century or more, and the point referred to as having to be determined geographically had been determined by Commissioners and *expressly* recognized as a point in the boundary by the Legislature of each state, the final question was reduced to either the adoption of an old line, run as the boundary, though inaccurately and not true to the meridian, and which had been recognized for many years by the many settlers, and whose farms were bounded by that line, or to adopt a new line, running true to the meridian, with a variance of three-quarters of a mile in 38 miles. In view of all the circumstances, the court adopted the old line as having been surveyed, marked and recognized as the line of the grant.

Maryland claimed through a grant from King Charles to Lord Baltimore in 1632, and West Virginia through a grant from King James to Thomas (Lord) Culpeper in 1688, to whose right, through Lord Fairfax, West Virginia succeeded. The Western boundary in question was to start at the uppermost fountain or spring of the Potomac River and run north to the Pennsylvania line. The Potomac forked into two branches and the north branch again forked into two small branches which took such courses as to raise a question as to which was formed by the uppermost fountain. The one would give a meridian line about 1¼ miles farther west than the other.

Disputes arose between Lord Fairfax and the Governor and Council of Virginia over the boundaries of the grant.

Upon petition of Lord Fairfax the King in council made an order in 1733 for a commission to issue, run out and ascertain the boundaries (page 271). In 1736 the Governor of Virginia appointed Commissioners and Lord Fairfax appointed commissioners in his own behalf.

The commissioners were instructed to make a clearer description and to make exact maps and to show thereon the "head-spring, so-called or known." These commissioners made a report which was laid before the King in council, when further commissioners were appointed to run and mark the line. These commissioners planted the stone known as Fairfax stone at the head of the branch whose fountain was farthest east, marking that as the head of the Potomac River. This was in 1746. In 1748 the location of this stone was approved by the King in council and the Virginia Council, and was thereafter generally recognized as an important Government monument by the State of Virginia. In 1851 Maryland adopted a constitution and therein named the Fairfax stone as a monument in one of its provisions. In 1872, pursuant to the said provision in its constitution, Maryland made the Fairfax stone a monument in the then created Garret County which the constitution had provided for.

While this point in the boundary had been thus established, and to a great extent recognized, there were frequent other efforts to have the boundary definitely and permanently located.

In 1781 Maryland provided for laying out a portion of the state into 50-acre lots, and, in so doing a line was run, about 1787, from the said Fairfax stone northerly to the Pennsylvania line, then and ever since known as the Deakin line. That line was *generally* recognized as the boundary, and many acts of both states tended to so recognize it, and for a portion of the way the country became thickly settled, the settlers on the west holding under grants from Virginia and those on the east from Maryland.

In 1852 the Legislature of Maryland again took action with a view to joining Virginia in a survey of the line and in its resolution recited:

> "It is of great importance that the western territorial limit of the state of Maryland be clearly defined and her boundary be permanently established; and whereas the true location of the western line of Maryland between the states of Maryland and Virginia beginning at or near the Fairfax stone, on the north branch of the Potomac River at or near its source, and running in a due north line to the state of Pennsylvania, is now lost and unknown, and all the marks have been destroyed by time or otherwise, and whereas the states of Virginia and Maryland have both granted patents to the same tracts of land at or near the supposed line, * * * which cannot be justly settled without establishing said boundary line."

Then provision is made for inviting Virginia to join in

> "tracing, establishing and marking the said line."

Here we have distinct recognition by Maryland's legislative body, of the fact that the line that had been run from

the Fairfax stone north was its western boundary, but that it had been lost, and required establishing.

That was a distinct and express acquiescence by the proper legislative body of the state in the line which Virginia and Lord Fairfax, with the approval of the King in council, had theretofore agreed upon.

Virginia accepted the proposition, and, in 1854 commissioners were appointed to run the line, beginning at the Fairfax stone. These Commissioners secured, through the War Department, the services of Lt. Michler, of the United States Topographical Engineers to aid in the work. He started at the Fairfax stone and ran "northwardly." His line intersected the Pennsylvania line at a point about three-quarters of a mile west of the northern extremity of the Deakin line, which had been run in 1788. In 1859 the Maryland Legislature adopted the Michler line, but Virginia did not adopt it. In 1887 West Virginia passed an act adopting the Michler line, but on condition that Maryland recognize the grants by Virginia within the territory between the Deakin and Michler lines.

The court says (page 276):

> "The divergence between the Michler line and the line shown on Deakin's map probably arises from the fact that Lieutenant Michler ran a true astronomical line, and that his line is a true north and south line, whereas the Deakin line was probably run with a surveyor's compass, and with less accuracy than the Michler line."

In Lieut. Michler's report he mentions the old line having been run with a compass, and under difficulties. He says (page 271) that if the meridian line is adopted it will cause great litigation because the patents of most of the lands call for the boundary as their limits. He then recites the variance in the two lines and shows that at one point they are 85 feet apart, at another forty, and at still another about twenty feet. In fact the report of Lieut. Michler

showed that there had been a general recognition of the Deakin line by the settlers, and that no individual boundaries would be interfered with if the Deakin line could be re-marked.

It therefore became only a question of re-marking a line that had already been laid down as the boundary, and there was no question of possession or acquiescence disturbing the line of a grant. The *line* of the *grant* had been established by the Deakin survey, finally *expressly* recognized by all parties in interest, and the court would not straighten out the irregularities or crooks in the line so long laid down as the boundary, and at so great an inconvenience.

In the case at bar no such condition appears to exist. The Michigan line has not been laid down and no conflict of titles appear to exist. The adjustment of surveys to accommodate them to the correct line would not be a difficult matter.

Defendant also cites, and claims thereby support for her theory of the defense of laches and acquiescence.

Vattel's Law of Nations (brief, page 840), Book 2, Chap. 11, Sec. 149.

Wheaton's International Law, Part 2, Chap. 4, Sec. 164.

Moore's Digest of International Law, quoting from *Virginia v. Tenn., 148 U. S., 503.*

As these are works on International Law we claim they have little or no application to the question of rights between states. As to this see *Moore & McFerrin v. McGuire, 103 Fed., 787,* where it is held (page 797) that rules of International Law governing independent nations cannot be applied to the full extent, in relation to states, on the subject of prescription and acquiescence.

There is much force in such holding for, most independent nations, especially those of the old world, claim their terri-

torial rights through discovery or conquest, while the states of our nation hold theirs by grant from a common Sovereign, regulated by constitutional enactments.

As to the defendant's quotation (brief, page 85), from *Moore's Digest* wherein it is quoted from the above cited case of *Virginia v. Tennessee, 148 U. S., 523,* this, as said above, was a case where the parties agreed upon the location of the line by formal compact, and the line so agreed upon was recognized for many years by both parties. The compact, though not approved by Congress, was held to be binding on the states under those circumstances. A careful review of all of defendant's citations fails to disclose any authority to sustain the position that the complaint or the complaint and cited public documents taken together, disclose conclusively, or even prima facia, either laches, acquiescence or other kindred situations to justify defendant's motion.

Other cases cited above by plaintiff are in accord with plaintiff's claim that there is no showing of any of these defenses, and that no such defense would be available in the present case upon the record as it appears.

In *U. S. v. Texas, 162 U. S., page 867,* the facts are recited in great detail and the decision treats of the Spanish treaty of 1819, of correspondence preceding the same and in regard thereto, of a large number of maps that likely influenced the decision of Congress, as to the boundaries, in the making of that treaty, and a very large amount of evidence as to the treatment of that line thereafter. There were various commissions for and attempts at an agreement. The differences first were between the U. S. and the Republic of Texas, and finally between the United States and the State of Texas.

The question in dispute was as to whether the boundary along Red River followed the center of the channel, or its south bank, and then as to which of two forks of that river should be followed. There was much evidence that Texas

had possessed the country between the two forks, neither of which were given any name other than the general name of Red River applied to that part of the boundary. After commissioners regarding the boundary had disagreed, and a commissioner from Texas had reported the northern fork as the boundary and the commissioner of the United States had reported the southern fork as the boundary, Texas treated the report of its commissioner as settling the matter and proceeded to and did organize Greer County, covering the territory in dispute between the two forks, that being a very large section of country. Texas claimed the United States had acquiesced by naming Greer County as one of the counties in a Judicial Circuit for Texas, created by Congress. Texas further claimed that the United States had acquiesced in that boundary by settling and paying damages occasioned by a conflict when the United States troops disarmed Texan troops within that jurisdiction. *The court finally found that the south bank of Red River and the south fork thereof constituted the boundary as fixed by the treaty of 1819 and that the same had remained binding throughout all the changes of Government, and it explained various actions of the Government as not having been intended to affect the boundary line, but as being incidents which might easily be overlooked in governmental affairs.* Another incident was that the Government established Post Offices and Post roads in the disputed territory as being in Greer County, Texas, but that was also explained as being such an incident as could not be construed to support an intent that the Government was thereby surrendering territory to which it had made claim.

A very large number of maps were considered and discussed for the purpose of getting at what was the intent of Congress as to the river which was to be the boundary, it being conceded that the maps were imperfect.

The testimony which seems to have been given the most weight was testimony as to the length, breadth and depth of the river and its drainage area, as well as the general

course of the river, and it was decided that the south branch most nearly complied with all those involved elements.

The court finally said, page 902, after discussing the claims of various parties:

> "The question before us, we repeat, is one of law and must be determined according to law. What may be finally and justly demanded by the state on account of moneys expended for the benefit of the inhabitants of the disputed territory is a matter for the consideration of the legislative branch of the National Government.
>
> In the argument it was suggested that this court ought not to forget how much was added to the power and wealth of this nation when Texas, with its imperial domain, came into the Union, and her people became the part of the political community for whom the constitution of the United States was ordained and established. This fact cannot, of course, be forgotten by any American who takes pride in the greatness of the Republic. But the consideration which it suggests cannot affect the decision of legal questions, but must be addressed to another branch of the government. The opinion is not to be indulged that that department of government will fail, to recognize any duty imposed upon it by the circumstances arising out of this vexed controversy."

For the reason stated the United States is entitled to the relief asked.

Then followed the decree establishing the line according to the treaty of 1819 but establishing that line above the forks in accordance with a large amount of varied kind of evidence as to what the *intent* of Congress was as between the two forks and, *notwithstanding the fact that Texas had organized a county and operated the government thereof from 1860 to the hearing of this case in 1895*

that section of the country was declared to be, under the terms of the treaty, not a part of the state of Texas. It had likewise claimed the country, as had the Republic of Texas, long before 1850.

It is very plainly said, in attempting to construe the treaty so as to arrive at its proper boundary:

> "The negotiators had in mind rivers and degrees of latitude and longitude, and that fact appears on the face of the treaty. It cannot be known that they were controlled, in any degree by information as to roads across the country, used by traders and explorers."

This was said in answer to a claim by Texas that the Santa Fe trail which crossed the north fork of the Red River would indicate that that river was the one referred to, but it was explained that no such trail was shown on any of the maps before Congress or the prominent maps issued prior to that time.

It is also said, in the last cited case (page 68), *page 895, L. C. O.:*

> "The respect due to a co-ordinate department forbids this court from taking any view of its (Congress') action that would imply a willingness to accomplish by indirection, or by the use of vague forms of expression, what, perhaps, could not have been accomplished in an open manner, or by employing such clear, distinct language as the occasion and the interests involved alike demanded."

This language was used in explaining why Congress, in having included the disputed territory, under the name of Greer County, Texas, in a Texas Judicial district, and because of the other acts upon which the defense of acquiescence was based, should not be held to have acquiesced in the claim of Texas that Greer County was within the boundaries of Texas.

The principle is particularly applicable to meet any possible assertion that can be made as to the action, or inaction, of the United States, or of Michigan, in the instant case. This authority effectively refutes defendant's claims to the effect that Government surveys, and actions of the State of Michigan in organizing counties and districts, constitute acquiescence.

The Court, in the cited case *(note, page 879, L. C. O.)*, treated the including of Greer County in a Texas Judicial district as an *"inadvertance, not singular in our legislative history."* Certainly, under the situation created by the treatment accorded the boundary in the instant case, and especially after Congress had expressly refused to grant to Wisconsin her claimed boundaries except upon the ratification thereof by Michigan, any action of the general government, such as the carrying on of a survey, could not be held to effect the purpose which, by direct action, had been refused. The court, also, in considering the evidence as to which fork of the river would meet the intent of Congress, and in deciding on the south fork, said that fork was determined upon, as thereby, to use the words of the court, *"the terms of the treaty are fully met."*

In the instant case, by changing the word "treaty" to "grant," the language is alike applicable to the boundary now claimed by Michigan, while it is not applicable to the line claimed by Wisconsin. The further language that the terms of the treaty would not be met by following the varied courses of the north fork, is alike applicable to the boundary claimed by Wisconsin. The decision in that case was rendered in October, 1895, and defined the boundary as along the south bank of Red River and of the south branch thereof.

Notwithstanding this decision Texas continued to claim title to the center of the river, in which valuable oil wells were developed.

Oklahoma, having become a state, brought action, *State of Oklahoma v. State of Texas, 41 Sup. Ct. Rep., 420, U. S.,* in which decision was rendered April 11, 1921.

In that case Oklahoma set up the boundary as described in the treaty between the United States and Spain, of 1819, and among other transactions regarding it, alleged the decision of the court in the above cited case of *United States v. Texas,* as rendering the matter *res judicata.* Texas claimed that in the last mentioned case the issue applied only to the territory between the two forks of the Red River, and not as to the location of the boundary along the main Red River.

To decide the question as to what issues were involved the record and the evidence in the former case were reviewed in the latter case, and in the decision of the latter case it was recited that the settlement of the entire boundary was within the issues in the former case and that by the decision the boundary *as described in the treaty of 1819 was fixed.* Also that Oklahoma then stood in privity with the United States and that the decision was therefore binding as between Texas and Oklahoma.

In the case of *Marine Railway & Coal Company v. U. S., 66, L. Ed., page 35,* decided November 7, 1921, the plaintiff claimed title to land by prescription. In the Potomac River, on the Virginia side, opposite the District of Columbia, there is a cove in the river bank and in that cove accretions accumulated so there was a tract of made land, and this had been occupied for a long period of years by plaintiff with its tracks and yards.

The decision rested on the fact that through the grant of King Charles 1st, in 1832, to Lord Baltimore, Maryland acquired and passed to the United States, the territory within the District of Columbia. That grant included territory "to the farther bank of the Potomac River," and the court held that the boundary of the District of Columbia extended to the Virginia bank of the Potomac River, at

least to low water mark. The grant from Maryland to the District of Columbia had the same boundary and was made in 1791. The plaintiff's claim of a prescriptive right was to land below low water mark, on the Virginia side of the river, and was thus within the original prior grant through which the U. S. derived its title to the District of Columbia. In reference to this the court said:

> "It may happen that such filling as is done in this case will interrupt previously existing rights to the water front, *but that does not affect the right of the United States to the possession of the land.* What other rights, if any, the plaintiff in error may have, does not concern us now." (Italics are ours.)

Thus the court refused to permit a title by prescription to be established, as against a title in the United States obtained through a prior grant from the Crown, and *also* held that a private person, claiming title under the laws of Virginia, could not acquire prescriptive title to lands in the District of Columbia.

In *Polaski County v. State, 42 Ark., 118,* it is held that while the *State* may be *estopped* by its *express* grant, *no bar can arise from the laches* or unauthorized acts of its officers.

The complaint in the case at bar asserts title in Michigan through a direct prior grant from the United States. There is no claim of a grant from Michigan to Wisconsin.

Under the authority of the last cited case Michigan's title could not be barred, by the laches or unauthorized acts of its officers. The defendant has not cited any authorized acts of Michigan officers that would constitute a bar to her claim of title, and therefore, the motion should be denied.

In *Lott v. Brewer, 64 Ala., 287,* it is said that courts look with disfavor upon applying the doctrine of estoppel against a sovereign state.

It appears to us that a review of all case law this far cited fails to support the defendant's claim that in the position of this case before the court at this time there is any conclusive showing of laches, or acquiescence or in fact any showing of either, but that, on the contrary any such situation is distinctly negatived.

We have thus far made but slight comment upon texts cited by defendant in support of the theory of acquiescence as applied to this case, and we refer again to

Vattel's Law of Nations, Chap. 11.

There, under the topic of "Acquiescence" as a defense, "Usucaption" and "Prescription" are mentioned as subdivisions, and as applied between nations, are considered.

Quoting from Wolf, the writer says of Usucaption, that it is:

> "The acquisition of domain founded on a long possession, uninterrupted and undisputed; that is to say, an acquisition solely proved by possession."

As to prescription, the writer says:

> "Prescription is the exclusion of all pretentions to a right—an exclusion founded on length of time during which that right has been neglected."

Of it Wolf is quoted as saying:

> "It is the loss of an inherent right by virtue of a presumed consent."

At page 187 it is said that prescription is based on the principle that one is supposed to be obliged to take care of his property.

Of it, it is further said (page 188):

> "It is true that if the bona fide possessor should

discover, with perfect certainty, that the claimant is the real proprietor, and has never abandoned his right, he is bound in conscience, and by the eternal principles of justice, to make restitution of whatever accession of wealth he has derived from the property of claimant."

Again it is said (page 188):

"As prescription cannot be grounded on any but *an absolute* or *lawful presumption, it has no foundation if the proprietor has not really neglected his rights.*"

This condition implies three particulars:

1. That the proprietor cannot allege an invincible ignorance, either on his own part, or on that of the person from whom he derives his right.

2. That he cannot justify his silence by lawful and substantial reasons.

3. That he has neglected his right, or kept silence during a considerable number of years; for, the negligence of a few years being incapable of producing confusion, and rendering doubtful the rights of the parties, is not sufficient to found, or authorize a presumption of the relinquishment. (Italics are ours.)

On page 189 it is further said:

"In cases of ordinary prescription the same argument cannot be used against a claimant who alleges just reasons for his silence."

Right here it is significant that the author also says (page 190):

"It must, however, be confessed, that, between nations, the rights of usucaption and prescription are

often *more difficult* in their application, *so far as they are founded on presumption drawn from long silence. * * * In such a case, therefore, it is not easy to deduce from long silence a legal presumption of abandonment.''*

Further considering the question, the author continues:

> ''To this we may add that, *as the ruler of the society has usually no power to alienate what belongs to the state, his silence,* even though sufficient to afford a presumption of abandonment on his own part, *cannot impair the national right or that of his successors.''*

Further commenting on the application of prescription to nations, it is said (page 191):

> ''Nay, more, as by virtue of that law nations are in all doubtful cases supposed to stand on the same footing of equal rights, in treating with each other, *prescription, when founded on long undisputed possession,* ought to have its full effect between nations, without admitting any allegations of the possession being wrong, *unless the evidence to prove it be very clear and convincing indeed.''* (Italics are ours.)

Another of Defendant's citations is

Wheaton's Elements of International Law.

Referring to Part, 1, page 11, we read:

> ''A state is a very different subject from a human individual, from whence it results that the obligations and rights, in the two cases, are very different, * * * There are consequently many cases in which the national law does not furnish the same rule of decisions between State and State as would be applicable between individual and individual.''

In this connection we cite further

Mayor of Kingston v. Horner, Cowper, page (02).

In that case Lord Mansfield said:

> "Any evidence showing a time when the claim did not exist is an answer to prescription."

In *Richards v. Williams, 7 Wheat., 59,* it is said:

> "Presumptions of grant * * * cannot arise, when the claim is of such a nature as is at variance with the existence of a grant."

The last is especially applicable to the nature of the title and possession of Wisconsin as appears from the complaint, and we further cite, to the effect that only that which is granted in clear and concise terms passes by a grant of property in which the government or public has an interest.

Rice v. Minn. & N. W. R. Co., 66 U. S., 358, 380.
Stein v. Bienville Water Supply Co., 141 U. S., 67.

Review of Facts as Especially Affecting the Claim of "Acquiescence" and "Laches."

In the light of these authorities the case of consideration upon this motion presents, as appears by the complaint and not weakened by documentary evidence, the following situation.

Michigan, through the Act of June 15, 1836, confirmed in January, 1837, received her grant of statehood from the United States, and therewith the right of sovereignty and domain with the boundaries therein described. The complaint alleges those boundaries to have been in accord with the boundaries claimed by Michigan in this case, and

for the purposes of this motion, we take it, such allegations must be taken to be true.

The complaint further shows that at that time Wisconsin was a Territory of the United States. It follows as a consequence that Wisconsin stood in privity with and was and is bound by the actions of the United States in making the grant and in its subsequent dealings therewith up to the time Wisconsin became a State. During that period Wisconsin's Territorial boundary along the disputed line was in accord with the line in the Michigan grant, the same as now claimed by Michigan.

In that situation the United States, through Congressional provision and its Department of War, directed and attempted a survey of the Michigan boundary along the present disputed portion thereof.

In January, 1841, Captain Cram who had been charged by the United States government with the surveying of that line reported that because of geographical conditions it was an impossible line, and that the boundary as described in the Michigan grant could not, as to a portion thereof, be laid down. That report was made a part of a Senatorial Document, and as such has remained ever since as an official record. The complaint alleges that that report misrepresented material facts, and that the line as described in the Michigan grant could have been laid down; another material misrepresentation charged in the bill is to the effect that the report was wrong wherein it stated that Lac Vieux Desert as therein referred to was the lake named in the boundary as Lake of the Desert. The complaint not only alleges that the report was wrong in that respect, but specifies that the Lake now known as Island Lake, some sixty miles from Lac Vieux Desert, is the Lake referred to in the description of the boundary as Lake of the Desert. The complaint further alleges that Captain Cram further misrepresented the facts when he reported that said Lac Vieux Desert was an essential point

in the boundary, and it alleges that said Lake is several miles from the boundary as described in Michigan's grant. Documents quoted in and maps made a part of the complaint support and furnish more details of the general allegations. The complaint further shows that Michigan relied upon that report as being true, and from the showing that Captain Cram was Captain of the Topographical Engineers of the War Department, it is made to appear that Michigan had a right to rely upon his report.

It further appears that in connection with that report Captain Cram made recommendations for Congressional enactments to so amend the boundary described in Michigan's grant as would, in his opinion, allow of a definite survey of part and a more easy survey of other portions of the line. In addition to the general showing of Michigan's reliance on and her right to rely on the truth of the report, the complaint sets out a joint resolution, adopted by the Michigan Legislature in January, 1841, reciting, almost in the language of Captain Cram, and unquestionably based on his report, that it appeared from a critical examination of the line that it was an impossible one. That resolution further recited a belief that a further survey would afford the locating of a line substantially in compliance with the intent of Congress, and it provided for the appointment by Michigan of a Commissioner, and requested the appointment by Congress of a Commissioner to accompany the surveyor in order to effect a location of the line. The United States and Michigan were then the only parties who could join in an adjustment, and Michigan properly requested it. Wisconsin Territory, though then in privity with the Federal Government, had no right of sovereignty, and no power to negotiate an adjustment. That resolution was tabled in the United States Senate, and, instead of complying with Michigan's request, Congress provided not for a further survey of the line of the grant which had been reported impossible, but for a survey and map of the country through which the line was described,

to enable Congress to decide on the line. At that time Congress and Michigan could legally have settled the boundary, by locating that line or agreeing on a new one. Again Captain Cram was sent by the Government to make the survey and map directed, and in his report of that survey he repeated his former representation that Lac Vieux Desert was an essential point in the boundary, and he reported the east branch of the Montreal as the Montreal, whereas the complaint alleges that the west branch thereof was the Main Channel and a part of the boundary. He also reported a point over six miles down stream from a lake (Pine Lake) at the head of the east branch, as the head proper of the Montreal and he marked it as such, while the complaint alleges Island Lake, at the head of the west branch is such point in the boundary. It also appears from the complaint that Captain Cram did not carry out the provisions of Congress for a survey and map of that country and did survey and include in his map the east branch of the Montreal River and name it the Montreal and that he did not survey, map or report the west branch. It further appears from that report that in surveying and reporting the East Branch as the Montreal River he arbitrarily established a monument more than six miles below the lake at the head of that stream, and he named that point, so marked, as the head of the Montreal, regardless of the fact that the description of Michigan's boundary calls for following up the main channel of the Montreal *to a lake*, and he reported the stream above that monument as an "inconsiderable" stream and called it Pine River, and he said there was a small lake at the head thereof which he named Pine Lake, thus practically repeating that part of his first report wherein he reported that the Montreal River was said to have no lake at its head. It also appears that that report was made a Senatorial Document and that it has ever since remained a public record, and that both said reports have continued to mislead the people of Michigan. The complaint further shows that the Cram reports represented the line recommended

by him would be substantially the same as that intended by Congress in the Michigan grant. The same situation appears as to the right of the public to rely on the second report and to the fact that it was relied on, as was the first report.

In 1842 and again in 1843 a Bill was introduced in Congress to Amend the Act of June 15, 1836, so as to make the now disputed portions of the boundary read substantially as Captain Cram had recommended, and substantially as Wisconsin now claims it. In that bill was a proviso that the same should not become binding unless ratified by Michigan within a specified period. By thus formulating the Bill it appears it was considered that Congress could change the boundary of its grant with, and only with the consent of Michigan. That bill failed of passage in each of the two separate Congresses. Thus the United States expressly refused to interfere with Michigan's rights under her grant.

In 1846 Congress passed the Wisconsin enabling Act with description of boundary as now claimed by Wisconsin and, though very materially different from the Michigan line, in fact, it was practically identical, except as to one point in the Menominee River, with the line recommended by Captain Cram, and which he had reported as being substantially the same as the line intended by Congress in the Michigan grant, and which he reported would give to each the State of Michigan and the Territory of Wisconsin substantially the same amount of the territory intended by Congress to be given to each. Notwithstanding Congress and the people had a right to believe those reports, and no reason to disbelieve them, a provision was made in that Act to the effect that *Congress would not be bound* by the description of the boundaries therein contained unless ratified by Michigan on or before June 1st, 1848. Thus again Congress recognized that the United States could not again grant what it had already granted to Michigan, and

because of the uncertainty as to the comparative lines and the possibility of their being in conflict, the proviso was inserted in the Wisconsin Act.

It must be clear from this that it was then recognized by all parties that Wisconsin's grant would not be effective as to such territory, within the lines of its described boundary, if any, as should be found to be within the lines of Michigan's described boundary, unless Michigan ratified the Wisconsin Act within the time specified.

Michigan Had Right To Be At Ease.

By this provision, and because of the said several reports, Michigan had the right to believe that the Wisconsin line was little if any different from the Michigan line, and that Wisconsin would yield to the Michigan line, in case of differences being discovered, unless Michigan gave way to Wisconsin, by ratifying the Wisconsin line within the specified period. No such ratification was asked or granted, and so Michigan had the right to believe Wisconsin was respecting and acknowledging Michigan's rights.

Thus, all the claim that Wisconsin then made to any of the territory which is involved in this proceeding was *under her grant* of August, 1846, *subject* to Michigan's right under her prior grant of 1836, unless Michigan should waive that right *within the specified time.* Not having secured the waiver the grant to Wisconsin did not become operative as to the disputed tracts. May 29th, 1848, within the period when Wisconsin was privileged to get Michigan's ratification, Wisconsin was admitted into the Union with boundaries the same as described in her enabling act; that is subject to Michigan's prior grant, in any point where the boundaries conflict, unless Michigan's ratification should be secured. Thus again we have Wisconsin's assurance of respect for Michigan's boundary when Wisconsin accepted

Statehood May 29th, 1848; Michigan had the right to feel secure.

Furthermore, Wisconsin's grant of Statehood was upon her having adopted a constitution (Defendant's brief, page 23).

In that constitution she expressly states,

> "that the State of Wisconsin doth consent and accept of the boundaries prescribed in the Act of Congress." * * *

and there describing her enabling act, and following with a detailed description of the boundaries.

Here we again call attention to the *proviso* in the enabling act making the boundary subject to Michigan's and in that connection we call attention to the section of the Wisconsin Constitution next succeeding the one describing the boundary, which reads (Defendant's brief, page 24):

> "Section 2. The propositions contained in the act of Congress are hereby accepted, ratified and confirmed and shall remain irrevocable without the consent of the United States."

While there were other propositions contained in that act of Congress, we claim that this section is broad enough to and does accept, with others, the provision as to the boundaries, and that the provision was also accepted by Section 1, where the Constitution expressly accepts the boundaries described in the act, and which *as* described in the act were provisional. So that, aside from Michigan's knowing that she was entitled to priority because of her prior grant, and not knowing there was really any, but being advised there was none of consequence, if any, Michigan had all these assurances of Wisconsin that Michigan's priority of right would be recognized in case the several boundaries should be found to conflict, Michigan had the right to be at rest.

One further feature of Wisconsin's Constitution of importance in this immediate connection is the fact that in the description of her boundaries (Defendant's brief, page 23), through Lake Michigan and Green Bay, Wisconsin's boundary is described as running

> "with the boundary line of the State of Michigan."

Furthermore, it describes her boundaries, after reaching the mouth of the Menominee River, as follows:

> "Thence up the channel of said river to Brule River; thence up said last mentioned river to Lake Brule."

There is no mention here of so describing the channel into sections, for convenience of territorial location of the Islands, as provided for in her enabling act.

It is an established principle of law where a river is named as a boundary, without other specification, the center of the main channel is the boundary. Thus the Wisconsin Constitution described its boundary through Green Bay and through the Menominee and Brule Rivers as exactly in accord with the boundary as described in the Michigan grant, and now claimed by Michigan.

This was nearly two years after the Wisconsin enabling act provided for a different division of the islands in the river, if Michigan would permit it. Michigan had not permitted it, Michigan's right to the main channel of the two rivers, and to the "most usual" ship channel of Green Bay was unquestionable, and, therefore, by the language of Wisconsin's Constitution Michigan was further justified in believing that Wisconsin was yielding to and would respect Michigan's boundary.

Michigan's Constitution of 1850.

Michigan's first constitution did not contain a description of her boundaries. As an instance by itself in history, Michigan, having for many years had the qualifications requisite for Statehood, but her appeals to Congress not being granted asserted her right to Statehood, because of her qualifications, and took the initiative by adopting a constitution without first procuring from Congress the usual enabling act. She then sought admission with boundaries as described in her Territorial act. This continued the conflict with Ohio, with the result that Congress denied Michigan's claims on the south and extended her boundaries to the northwest. This put Michigan in the position of having, as a portion of her grant, territory which had no representation in the adoption of the Constitution. True, the citizens in that portion of the state at that time could probably have been counted on one's fingers, but, nevertheless, such was the situation. Then followed the difficulties growing out of the Cram surveys, and Wisconsin's admission with her boundaries differently described and conditional, and with official reports on file representing that Lac Vieux Desert was an essential point in the boundary.

The Constitutional convention that framed the Constitution of 1850, faced the importance of stating a description of the boundary, varying somewhat from that in the Michigan grant, because Captain Cram had reported that Lac Vieux Desert was the lake which Congress called Lake of the Desert, and which Captain Cram reported Congress thought was at the head of the Montreal, and because of his report that the same was an essential point in the boundary. Wilderness continued to reign supreme in that part of the country, and the Convention had the right to believe, and had no reason to disbelieve the Cram reports. Therefore, in providing the description of the boundary in the Constitution because of the misinformation which those reports contained, the line of the boundary was deflected

from that described in Michigan's grant to the extent that in leaving the head waters of the Main Channel of the Montreal river, the Constitutional description of the boundary was made to run to Lac Vieux Desert, and then to the head of the Brule, instead of in a direct line from the head of the Montreal to the head of the Brule. In this connection we suggest our belief that a Constitutional Convention would not have authority to surrender any portion of the Territory for which it was authorized to simply form an organic law, but whether or not that is so the Complaint alleges, and the documents show that the change referred to was brought about by the misrepresentations referred to and the convention did not know that by such a change in the description important rights of Michigan would be sacrificed.

In this connection we call attention to the fact that, not only would such an act fail to meet the essentials of "acquiescence" because of lack of authority, and want of knowledge as to results on the part of the convention, but the act was brought about by the wrongful misrepresentations of an authorized representative of the United States, made at a time when Wisconsin, as a Territory, stood in privity with the United States, and furthermore, it seems to have been largely if not wholly inspired by the mistaken act of the Legislative Assembly of the Territory of Wisconsin in causing to be published the Judson map (Complainant's Exhibit B) as a copy of what was represented to be the most reliable map extant; while it was not such. It was that map which Captain Cram had, and of which he attached a copy to his first report. That was undoubtedly copied from a map now in the Library of Congress, printed in 1831 by John R. Tanner as said above. However, even if the Convention had no inherent right to surrender property, its positive declarations as to the right of the state, negative acquiescence in Wisconsin's claims to large portions of the boundary, for it follows exactly the description in the Michigan grant through the Montreal, Brule and Menominee Rivers and Green Bay.

The Constitutional Convention of 1867.

All we have said as to lack of authority, lack of correct information, misinformation and misrepresentations that influenced the convention of 1850, is applicable alike to the Convention of 1867. In that convention there was a strenuous effort to make the proposed constitution conform to the Wisconsin description of the portion of the boundary west of Lac Vieux Desert.

The debates in that convention show conclusively that none of said mistakes and misrepresentations had been discovered, and it was strongly argued that if there had been mistakes they would have been discovered before that time, and it was also claimed that the convention could not prejudice Michigan's possible rights. Under those circumstances the convention described the boundary by including therein as monuments, Lac Vieux Desert and the Cram monument. It is a significant fact that the people repudiated that action and *refused* to adopt such change in boundary by their refusal to adopt the proposed constitution. That convention did, however, describe the boundary as following up the Main Channel of the Montreal River, and also the channels of the Brule and Menominee Rivers and Green Bay, exactly as in Michigan's grant, thus again negativing "acquiescence."

First Discovery By Michigan of the Mistakes of Captain Cram and Others.

While the complaint shows that the country remained a wilderness until after 1885, and considerable of it is still such, it also shows that about 1885 George H. Cannon, while on a private exploring expedition, discovered that

the East Branch of the Montreal had been used as the boundary and that the West Branch was larger and was the Main Channel of the Montreal, but that this information was not brought to the attention of the State until about 1907, and that the State promptly thereafter took steps to assert its rights.

While as a matter of fact, for the purposes of this motion the statements in the complaint must be taken as true, we will say we have seen and expect to produce in evidence, a letter written in 1906 by Geo. H. Cannon to Peter White for the first time divulging his discovery as to the error in the Montreal River boundary. This letter is not a public document of which the court takes judicial notice, but the original can be procured as evidence.

It is evidence we are entitled to produce under the allegations of the Complaint, to negative laches, or acquiescence. The Complaint then alleges that Peter White promptly thereafter brought the matter to the attenion of the Attorney General of Michigan, which fact was promptly followed by legislative action which resulted in Michigan's claims being presented, through Peter White, to the Governor and Legislature of Wisconsin with request that Wisconsin join in negotiations for an amicable settlement. This Wisconsin refused; the refusal was reported to the Michigan Legislature, and the Legslature at the same session, in 1907, directed the Michigan Attorney General to cause a survey to be made, and to take such action as might be necessary to protect Michigan's rights.

The complaint alleges that an engineer was employed and investigations were begun, but no survey was made and investigations were not completed. Among other things the complaint shows that a letter from a Government official at Washington in answer to an inquiry concerning Captain Cram's report, stated that Captain Cram established the line and that his report was approved by Congress. It further appears that the then Attorney General

went out of office without filing a report, and that the engineer employed died. We might add, perhaps as an historical fact with so important a personage as Hon. Peter White, who had so interested himself in behalf of the state, died in 1908. At least we should be permitted to so prove before being charged with laches since then. Under any circumstances, the situation developed as set forth in the complaint, was such as would require several years to ferret out, and it involved a task practically impossible for a man with so many duties as devolve upon an Attorney General, and then, too, nothing had been surmised of any other mistake than that of taking the East Branch instead of the Main Channel of the Montreal River. From that time on, even if nothing had been done by the Attorney General, there was not sufficient time before the further legislative action in 1919, hereinafter referred to, to constitute either "acquiescence" or laches if such a defense could be pleaded. However, these were negatived by the

Constitutional Convention of 1908.

By that convention all possible theories of acquiescence were negatived, so far as could be with the knowledge of the situation then at hand. The convention was exactly in the situation which the conventions of 1850 and 1867 had been as to the knowledge of the country; the misrepresentations and misinformation, except as to the one discovery that the East Branch of the Montreal River instead of the West Branch had been used as the boundary, and that the claimed boundary had stopped short of following even the East Branch to a lake at *its* head. The convention with that knowledge, but still relying on Captain Cram's report that Lac Vieux Desert was an essential point in the boundary, included in the constitution then formed the boundary as described, and the only deviation therein from the description in Michigan grant was by emphasizing the fact that the West Branch of the Montreal, with Island

Lake at its head, was the Main Channel and a part of the boundary, and then, because of said misrepresentations as to Lac Vieux Desert, deflecting the line from Island Lake to the head of Brule River so as to pass through Lac Vieux Desert, instead of taking the direct line as provided in the grant.

As to the boundary through Montreal, Brule and Menominee Rivers and through Green Bay, the constitution of 1908 reaffirmed Michigan's claim to the boundaries as described in her grant.

As to the deflected portion of the boundary the act did not constitute an "acquiescence" because of the misrepresentations and misinformation that induced it, and as to all other portions it positively negatived acquiescence. That Constitution was adopted by the people of Michigan and became effective January 1st, 1910, and thereby *the people effectively and expressly* negatived acquiescence in so far as the errors had been learned. They could not acquiesce in those of which they had no knowledge.

Michigan's Boundary Commission.

In 1919, Michigan Legislature, which meets only biennially, provided for the appointment of a Commission to investigate the disputed boundary, and gave to it authority to negotiate with authorities in Wisconsin for an adjustment of the boundary, and, in connection with the Attorney General, to take such action in the courts or otherwise as might be necessary to determine the rightful boundary.

That Commission, and, through it, the state first discovered the errors of Captain Cram as to those portions of his report regarding Lac Vieux Desert, and as to that portion representing that the Michigan line was an impossible line, first discovered that at the time of the Mich-

igan grant in 1836, Congress had the map shown as Exhibit A of the Complaint and knew of the Lake connected with the Montreal River mentioned in the description of the boundary as one of the Lake of the Desert and referred to as the Lake of the Desert reached by ascending the Main Channel of the Montreal. Discovery was also then first made and communicated to the officials of the State that many Islands in the Menominee River and in Green Bay really on the Michigan side of the boundary channels had been surveyed in connection with the surveys of Wisconsin, and Michigan did not earlier know that any islands connected with the Wisconsin survey were, in fact, on the Michigan side of such boundary channels, which, as a fact, the Complaint alleges them to be. Said Commissioners also had engineering done upon both the Montreal and Menominee Rivers, and following such investigation, in 1921, invited Wisconsin to join in negotiations to determine and settle all the now disputed portions of the boundary, but Wisconsin refused and, after further investigation by the Commission, this action was, with permission of the court, commenced.

We submit we have made a fair statement of the showing by the complaint and that it sets up a good cause of action as to each and every the specified divisions of the disputed boundary, and affirmatively shows that the plaintiff has not acquiesced in the wrongs complained of and has not been guilty of laches.

The foregoing statement has been practically based on the allegations of the complaint itself on the theory that the public documents referred to in defendant's brief do not modify the showing by the complaint and do not, in view of the cited authorities, even tend to establish acquiescence or laches, not to say *conclusively* establish the same, as would be essential for the support of this motion.

We therefore desire now to make

Comments on Documents Cited and Errors Found in Defendant's Brief.

Defendant's counsel say (brief, page 8):

> "The description of the boundary contained in the enabling act of the State of Michigan contemplated a continuous waterway separating the Northern Peninsula from the rest of the territory."

This is erroneous. A careful reading of that description (Defendant's Brief, page 4) conclusively shows that the above quoted statement is wrong, for, after arriving at the Lake of the Desert as named in that description, the course reads,

> "thence in a direct line to the nearest headwater of the Menominee River."

It is quite apparent that this erroneous statement was arrived at from reading Captain Cram's erroneous comments on the use by Congress of the erroneous map of which Captain Cram attached a copy to his report, explaining its inaccuracy, but wrongfully concluding that Congress was guided, in writing the description of Michigan's boundary by the map (Complainant's Exhibit B). Cram so argued in his report, notwithstanding a reading of the description is convincing otherwise. The map (Complainant's Exhibit A) is the map Congress had and it tallies with the description referred to. Captain Cram's report seems to have misled defendant's counsel to make the erroneous statement quoted above, and perhaps this is the most forcible illustration at hand of the misleading influence we have attributed to several features of the Cram reports. From their discussion of those reports in the pages following the quoted paragraph we believe we are justified in the conclusion that Captain Cram's errors in his report furnish the reason for the error of counsel in

the quoted paragraph, because they follow that paragraph with several pages of quotations from the report, a number of which were erroneous conclusions of Captain Cram's as subsequent developments conclusively show.

The next error we will refer to may be simply clerical, but its importance warrants this attention. On page 13 of the brief it is said:

> "As to the most usual ship channel of Green Bay, Captain Cram was not in doubt."

It appears to us the word "not" makes the statement erroneous. In this we find support in the quoted statement from the report farther down the page, where he says of the channels that there are at least two and that it would be next to an impossibility to get evidence to decide which was the most usual one.

Defendant's Attempt to Show Ambiguity in Boundary.

Again we are supported in our position that Captain Cram was wrong in many features of his report, and that the same was grossly misleading, by the comment we find thereon at the top of page 14 of defendant's brief, where it is said:

> "Captain Cram's whole report goes on the assumption that Congress has described a boundary that could not physically exist and that therefore no land titles became fixed by it. His report quite apparently indicates a latent ambiguity in this description of the boundary."

Thus we have counsel's frank confession of Captain Cram's conclusion and report that the boundary described in the Michigan grant was an *"ambiguous"* one *"that could not physically exist."*

Undoubtedly it was upon this report that counsel have

adopted and have wrongfully charged plaintiffs with having the theory that the line of the Michigan grant was an ambiguous one.

That the line of the boundary so described was not ambiguous is positively shown by the records, and the mistaken report of Captain Cram in that regard is one if not the principal occasion of this trouble; it is one of the errors charged in the Complaint.

All that is necessary to establish the error is to take the map (Complaniant's Exhibit A) which Congress had when the grant was made, or the engineer's map (Complainant's Exhibit E), and from either trace the boundary. Take Exhibit A, start the description at the mouth of the Montreal River (Complaint, page 2) reading:

> "thence through the middle of the Main Channel of said river Montreal, to the middle of the Lake of the Desert."

If Captain Cram had taken that course, and especially if he had had with him the map (Complainant's Exhibit A) instead of the erroneous map (Complainant's Exhibit B) when he came up the Montreal to the lake, in Exhibit A shown as one of the Lakes of the Desert, he must have determined that to be the Lake of the Desert shown to be connected with the Montreal; the Lake of the Desert to be found by following up the channel of the Montreal and consequently, a point in the boundary. The Complaint alleges that the Lake at the head of the Main Channel of the Montreal was known to Congress as one of the Lakes of the Desert and was the Lake of the Desert mentioned in the description of the boundary (Complaint, page 4), and that is sufficient, for this motion. Arriving at that Lake and locating its center the engineer would next, by a course of engineering, have determined the location of the course of the boundary as described,

> "thence in a direct line to the nearest headwater of the Menominee River."

English could hardly be plainer. There is nothing ambiguous about it. It was Captain Cram's mistake when, with his old erroneous map he determined that the Lake at the head of the Wisconsin, then and now known as Lac Vieux Desert, was the Lake which Congress thought was the head of the Montreal.

And counsel refer to Captain Cram's said report, which is now proven to be incorrect, as a piece of documentary evidence, to *conclusively* prove the complaint erroneous in an essential feature, and to prove that by it Michigan was informed of exact conditions in that part of the country.

Apparently to further contradict the allegations of the Complaint that the boundary could have been laid out as Michigan claims, defendant's counsel publish, following page 14 of their Brief, map No. 2, attached to Cram's report, showing as he then erroneously reported, a more perfect illustration of the Montreal, and with no lake at its head. That map, made from hearsay, as his report shows, and now shown to be grossly erroneous, emphasizes plaintiff's allegations of misrepresentation. We can hardly see how that can be introduced as documentary evidence of a *conclusive* character to contradict allegations of the Complaint and unless it is so claimed to be we cannot understand why it is introduced by defendant at all.

In discussing Captain Cram's work in connection with the Montreal River (Brief, page 16) defendant's counsel are in accord with our views where they say he *"deliberately"* fixed the junction of two streams "as the head proper of the Montreal River," only we say he *"arbitrarily"* did so. He was not at that time authorized to locate any boundary. That was his second trip when he was to survey and map for Congress the country through which he had reported the Michigan boundary as described could not be laid down. If he had had authority to act he should have found the lake at the head of the stream as the description required.

We wholly disagree with and challenge the correctness of the statement on the same page where it is said:

> "All the facts with relation to these streams and this part of Montreal River were fully brought out and minutely mapped, and * * * Congress for the first time had before it such accurate information upon which it could fully designate a specific and fixed boundary line."

Our exceptions are two fold. According to the Complaint, supported also by documents, Congress was not given the details it had called for, and it was not informed of the facts regarding or a survey of the West Branch of the Montreal River which the Complaint alleges to be the Main Channel and a part of its boundary, and was not informed as to the lake at its head. Furthermore, Congress could not at that time change the boundary of Michigan's grant without the consent of Michigan.

As to the *Burt Survey* (Brief, page 18), we refer to it to emphasize the statement in the brief in three particulars, first it was ordered as a survey of the Wisconsin and not the Michigan boundary, second, it was ordered four days after the passage of the Wisconsin enabling act while the line was known to be conditional, and subject to Michigan's ratification, if it should conflict, as it did, with her boundary, and, third, in making the survey Mr. Burt was given no discretion as to boundary, but was directed to survey and mark the Line from the Lac Vieux Desert to the Cram Monument. So there was no feature of it that could affect the issues here. We would like to add here, as an historical feature, provable by public records, that excitement in the copper regions to the north had then become intense, and there was an insistent demand for a survey of the copper country. As a consequence the United States had Mr. Burt sectionize the country between that line and Lake Superior, and Mr. Burt did that in connection with his survey of the Cram line. This fact is shown on his map of that survey.

Under the authorities quoted above of

United States v. Texas, and
Texas v. Oklahoma,

those acts were only incidentals of government and could not be held to effect indirectly what the Government had, almost in conjunction therewith, refused to do directly. But at any rate all the sectionizing was within what belongs to Michigan anyway, and there was no occasion to object.

The Wisconsin Enabling Act.

This is referred to in defendant's brief, page 19. It was the line specified in that act that Mr. Burt was directed to survey between certain monuments there mentioned. It was equally different from the Montreal and Menominee River Sections of Wisconsin's Territorial boundaries as it is different from the boundary now claimed by Michigan.

Defendant's Comments on Michigan's 1908 Constitutional Convention.

We challenge both the correctness and the propriety of the statement at top of brief (page 22), in regard to the quoted remark of a reason said to have been given in the convention by Mr. Burton, Chairman of the Committee on boundaries. Neither in the argument presented or in the debates of the convention do we find the slightest justification for the statement in the brief regarding the quotation favoring the change in the wording of the boundary description as

> "solely for the purpose of forcing from the State of Wisconsin a favorable settlement."

The description of the boundary as contained in former

constitutions having been found infringed upon, and Wisconsin having then refused to accept Michigan's invitation to an amicable adjustment, and the Michigan Legislature having then directed the Attorney General to have a survey made and to take such action as necessary to settle the question, it was highly proper that the convention declare itself positively as to its claims on that portion of the line in dispute.

It is quite probable that Mr. Burton shared the peaceful attitude which Michigan had already exhibited, and he may have indulged the hope that Wisconsin would yet doff its war paint and join in an amicable settlement, but, whether it was to be peace or war, the declaration of the boundary specifically, at the point where it was known to be in dispute, was commendable.

The change in the wording was the action of the convention and not simply of "some of the delegates." The disputed territory at that time had been within the Wisconsin claimed, conditional boundary from 1848 to 1908, or sixty years. It had not

"for nearly a century belonged to Wisconsin,"

as stated on the same pages of the brief, and thus we challenge both their correctness and propriety.

These random statements may not be of great importance, but there has already been too many misleading incidents in connection with this boundary, and so we do not dare pass them by for fear we may be said to have "acquiesced" and our comments seem called for even at the expense of a long brief.

Defendant's Analysis of Michigan's Claims.

This is found on page 24 of Brief.

We agree with subdivision (a), paragraph 1, to the extent that it applies to Michigan. That *the boundary of Michigan as described in its grant*

"is fixed and certain, and unalterable,"

except with the consent of Michigan.

We do not agree that the same rule applies to the description of the boundary in the act creating Wisconsin Territory. The *course* of the line was the same in the two acts, but our position is that by the creation of the Territory of Wisconsin, as of all our other territories, there was no grant of sovereignty, and Wisconsin gained no vested rights in the land. Michigan had learned this to her then sorrow in the contest with Ohio.

We positively disagree with subdivision 2, and assert Michigan's claim to be that her boundary remains the same as in her grant, but that it has been transgressed by Wisconsin whose transgressions were submitted to only because of misrepresentations, and of lack of knowledge in Michigan that her rights were being transgressed.

The present line claimed by Wisconsin as the boundary never was laid down as Michigan's boundary and never was accepted by her as such.

Subdivision 3 is also erroneous. It is plainly stated in the Complaint that no knowledge of any of these transgressions came to the officials of Michigan until *1907,* not *1885,* as stated in defendant's brief; though, of course, a little matter of 22 years is not much as between states.

As to subdivision (b), paragraph 1-a, we indorse it.

Paragraph 1-b, we indorse except that part (page 25) where it says Michigan's theory is

> "That Island Lake is the Lac Vieux Desert intended by Congress."

We would correct this by saying that our theory is that *Island Lake is* the *"Lake of the Desert"* named in the description of Michigan's boundary. *Congress did not* use the name "Lac Vieux Desert" in describing the boundary. We protest that those names have already caused too much confusion, and it ought not to be added to.

We challenge paragraph 2 of subdivision b (page 25). We do claim Michigan owns to the Main Channel. If Wisconsin withdraws her claims to any islands on the Michigan side of the Main Channel we will have only to further request the location of that Channel.

It is Michigan's claim that she never knew, until 1921, that any islands included with the survey of Wisconsin were on the Michigan side of the Channel.

Defendant's Discussion of Michigan's Principal Claims (Brief, page 25).

Again we must disagree with the general statements.

Our proposition *does not* presuppose a knowledge of all details of the country. It does presuppose a general knowledge that enabled Congress, by designating the Main Channel of the Montreal to fix a definite line to a Lake which existed at its head, and from there it was only a matter of engineering to go in a direct line to the nearest head water of the Menominee. There was nothing indefinite. The grant was positive.

Michigan's complaint is not susceptible of the construction defendant there puts upon it, and again defendant

seeks to use a map, characterized by plaintiff as erroneous, to disprove allegations of plaintiff charging the map with being erroneous. The Complaint shows the map (Complainant's Exhibit 2) to have been similar to a map used by the Judiciary Committee in 1834, when the committee tentatively agreed on the general location of the boundary to be along the courses of the Montreal and Menominee Rivers, which, on that map were shown to have a common source in a lake, or several connected laches, thus showing a continuous waterway.

The Complaint specifically alleges (Complaint, page 4) that prior to the grant in 1836

> "it was learned by Congress that the said boundary was not a continuous water boundary and that there were numerous lakes in that part of the territory from the head waters of the Menominee River to the head waters of the Montreal River."

The map (Exhibit B) is attached to the Complaint as a part of the showing of Captain Cram's error in interpreting the understanding of Congress, and not to show the understanding of Congress at the time of the grant. We seem to have been unable to prevent defendant's counsel from again being misled by the map portion of Captain Cram's report.

Among other errors is the statement (bottom of page 25) that the claim is founded on the proposition

> "that Congress had in mind and knew the exact volume of water flowing through the various branches of the Montreal."

The statement characterizes itself. The exact reverse is true, that is, that Congress, knowing there was or might be more than one channel of the Montreal River, and not

knowing which was the *Main* channel, designated the "*Main*" channel as the boundary so it would be definitely determined and could be laid down.

Congress Did Not Consider the Boundary Temporary.

A statement that it did is found in defendant's brief (page 26), but no *fact* to sustain it is pointed out. Congress sent the second surveying expedition because Captain Cram had erroneously reported that the Michigan line was a geographic impossibility. Not because there had actually been any uncertainty in the line of Michigan's grant.

The statement is erroneous (page 26) that Congress *more specifically* described the (Michigan) boundary

> "and directed a survey to be made and the line, not evidenced by natural boundaries, properly marked with proper monuments. This was done by the survey of Burt in 1847."

What we have heretofore shown as to the Burt survey refutes the correctness of this statement. The Burt survey was of only a part of the boundary described in the Wisconsin Enabling Act and it was made when that line was specifically subject to ratification by Michigan. It is going too far altogether, to say that by that proceeding Congress made the Michigan boundary more specific, while it is perfectly clear that Congress took especial pains not to in any way affect the Michigan boundary, and expressly said so.

In defendant's brief (page 27) it is said:

> *"The present boundary is in substantial accord with the original description contained in the enabling act of Michigan, and the Wisconsin Territorial Act."*

If counsel had said the present *boundary as claimed by Michigan* is *exactly* the same as in the Michigan grant and the Wisconsin Territorial Act, the statement would have been correct. If they claim the boundary claimed by Wisconsin is the same, they are far from correct, as it varies exactly to the extent of the issues in this case.

At the expense of monotony, we must again say that counsel present the erroneous report of Captain Cram to support their erroneous theory, and refer to a portion of that report which the plaintiff charges with having been especially misleading where he says the line he recommends is substantially the same as that of the Michigan grant, which was far from correct, and counsel to support said false theory continue to indorse and use Cram's erroneous conclusion that Lac Vieux Desert was an essential point in the boundary instead of the Lake of the Desert which Congress named and which was located as Congress described it; as connected with the Montreal River.

The balance of the argument on page 28 as to the effect of the course of the Montreal River on the question of which Branch Congress intended, seems hardly appropriate to this argument, as there may be much evidence on that point, which can be produced at a hearing on the merits. However, as the point has been raised, we submit that by a comparison of any of those maps of that day with a map of the situation as it is, even by taking the West Branch, as Michigan claims we should, as the boundary, and then running from Island Lake to the head of Brule River, Michigan is getting much less territory than Congress intended she should have, taking any of those early maps to indicate that intent.

Defendant's counsel also says (Brief, page 29):

> *"The Public Officials of Michigan were aware of the situation with reference to this boundary."*

This would have been more accurate had it read *the public officials of Michigan were misinformed and misled by Captain Cram's first report* regarding the boundary.

Counsel quote, in support of their proposition, the joint resolution of the Michigan Legislature of January, 1841, whereby Michigan, by reason of Cram's report that the Michigan line was an impossible one, proposed joining the United States in sending Commissioners to settle it. Here again the erroneous proposition is based on an erroneous part of the report complained of.

The further argument (page 30) that by the enabling act of Wisconsin, Congress specifically placed a construction on the Michigan boundary is wholly fallacious, for, by the proviso in the act, Congress *expressly refused* so to do.

If, perchance, we omit specific criticism of any erroneous statement in defendant's brief we ask the court to consider that we be not found to have "acquiesced" therein, but to have considered them criticised by our general statement of plaintiff's position, and this we ask to defendant's reference (page 30) to the Constitutional Convention of 1850, of which we have already written.

We cannot, however, pass without criticism the historical quotation and the comment thereon found on page 31.

Dr. Houghton did not Accompany Captain Cram and Captain Cram did not survey any line west of Lac Vieux Desert in 1840.

Counsel say:

> "The familiarity of the public authorities of Michigan *with the exact situation existing* with *reference to this boundary line is clearly established when it is considered that Dr. Houghton,* State Geologist of Michigan *in 1840,* accompanied Captain Cram on his first surveying expedition." (Italics are ours.)

This was in support of a quotation made from a document as follows:

> "Historically considered the exploration of this region commenced in 1840, when Dr. Houghton, as Commissioner of the State of Michigan, accompanied Captain Cram, the State Topographical Engineer, who was then surveying the Menominee and Montreal Rivers."

We hardly know where to begin on the many errors in these two quoted paragraphs.

Referring to the document from which the quotation is made, we find it to be an historical article by Charles Witelsey written in 1849. Following the quoted portion he says:

> "In 1840 and 1841, Dr. Houghton examined the rocks on both these streams and the country between their sources."

He makes no pretense of writing on the boundary.

The *Historical* quotation is so inherently erroneous that it condemns itself. We can find no record of Dr. Houghton having been "Commissioner of the State of Michigan in 1840," or of his having accompanied Captain Cram while he was surveying. If so important a personage as Dr. Houghton had accompanied Captain Cram, and especially if he had accompanied him "as Commissioner of the State of Michigan" Captain Cram, who was making the survey would undoubtedly have mentioned it in his report. Another error in the *historical* paragraph quoted is the statement that Captain Cram was *"State Topographical Engineer,"* when as a fact he was Captain of the Topographical Engineers of the War Department of the United States.

Furthermore, the reference to Dr. Houghton as having been a Commissioner for Michigan in 1840 and his accompanying Captain Cram on his survey, as furnishing

information to Michigan officials as to the facts regarding the boundary are condemned in themselves. Captain Cram did not survey the disputed part of the boundary in 1840. He did not even traverse the country West of Lake Vieux Desert that year, but he made a very erroneous map, from hearsay, and erroneously reported the country so the people were misinformed instead of being informed as to the facts. Because of that report, and in January, 1841, the Michigan Legislature provided for the appointment of a Commissioner to accompany a Commissioner to be appointed by the United States but Congress did not meet the proposition and so no Commissioner was required. There was no occasion for such a Commissioner in 1840, the time referred to in the quoted paragraphs.

The assumption of counsel is fully refuted by reference to Dr. Houghton's reports as State Geologist for the two years 1840 and 1841.

His report for the year 1840 made early in 1841 says:

> "My individual labors during the past season (1840) have been chiefly devoted to surveys connected with the *northern slope* of the upper peninsula, and to this district the chief observation in this report will be directed."

Judicial notice will be taken of the fact that the "northern slope" of the peninsula occupies a very narrow strip along the south shore of Lake Superior. Of this he says (Report, page 11):

> "Montreal River is a comparatively small stream, *made up of numerous small tributaries, that rise* among the ranges of hills to the *southwest and southeast* of its mouth. The passage of the river through the range of hills near the lake gives rise to several very considerable water falls, as also to much rugged and wild scenery. * * * *This stream, it will be recollected, forms a portion of the boundary between Michigan and Wisconsin.*" (Italics are ours.)

So here, at first hand, is the extent to which Dr. Houghton informed the people of Michigan of the facts regarding the boundary. That he was not with Captain Cram in his work on the boundary is conclusviely shown by the reports of the two gentlemen. Captain Cram reports his work as up the Menominee River and surveying from Brule Lake to Lac Vieux Desert where he arrived in October and could go no farther, one reason therefor being the lateness of the season.

Pardon a slight digression in argument here. Dr. Houghton mentions the Montreal River as "made up of numerous small tributaries that rise * * * to the *southwest and southeast of its mouth.*" That rather counters defendant's claim that the West Branch was not a part of the Montreal River but was the "Gegogosugon." The Montreal, as it appeared to so big a man as Dr. Houghton, was made up of the entire system with branches rising both southwest and southeast of its mouth. Dr. Houghton simply and casually mentioned that the Montreal River was the boundary. He does not discuss which Branch. Captain Cram had not then seen the Montreal and no attempt had been made at its survey.

To argue that such quotations as that in the brief are "conclusive" or even that Michigan was informed by Dr. Houghton of the conditions along the boundary in 1840 is, as appears to us extremely fallacious.

Dr. Houghton's report of his work for the season of 1841 mentions geological features between the heads of the Menominee and Montreal Rivers, but makes no mention of any difficulties concerning the boundary. That was the season Captain Cram was surveying the country to make a map to aid Congress in locating the line which Captain Cram had, the previous year, reported impossible. It follows, as a consequence, that Dr. Houghton could not give to Michigan officials information which Captain Cram was charged with getting for the United States, but failed in part to get, and while Dr. Houghton was giving his at-

tention to the mission assigned to him, the making of the very important geological survey.

The discussions following (Brief, page 31) as to the intent of Congress regarding the channel of the Montreal River to be followed (page 32), regarding Island Lake being a point in the boundary (page 33), regarding the Menominee River boundary (page 34), as to the Green Bay boundary, and (page 35) as to the most usual ship channel, are each upon matters of fact alleged in the Complaint. We have discussed each topic in our general showing as to plaintiff's case. Nothing, at least nothing *conclusive* is presented on any of these points to alter or refute the allegations of the complaint.

Counsel's statement (page 36), "*That discrepancies they have pointed out show that public records entirely contradict the fundamental principles of the Complaint.*" The only foundation for this that presents itself to us is the Cram reports and the "Historical" article quoted from. We have endeavored to show both extremely erroneous. We believe, at least, they do not show themselves to be and there is no showing that they are all the evidence presentable on the issues to which they refer. Furthermore, the plaintiff ought to be permitted to prove her allegations in the complaint as to the errors in those reports.

Defendant's Discussion of Motion to Dismiss Being Proper Remedy.

We do not deny but that a motion to dismiss is the proper remedy when the Complaint alone, or the Complaint in connection with *conclusive* evidence in the form of Public Documents show, conclusively that there is no cause of action.

We do say, however, and we believe our argument is such as shows that fact, that there is no showing that all

the evidence that can be produced on any essential allegation is before the court, or that any document cited contradicts conclusively any material allegation. We have not been able to discern that any such an instance has been pointed out.

Further, on this heading, we do understand that if a complaint, attacked by a motion to dismiss, is found wanting in any particular essential, it is the usual practice to afford an opportunity to amend, but as yet we have been shown no necessity for an amendment.

The defendant's quotation (page 38) from the case of *Rhode Island v. Massachusetts* is in support of our position, and is to the effect that where a contest is set up as to an *original* boundary, and a plea is interposed to the effect that the *boundary has been settled by compact,* and if the plea is found to be "sufficient in law and true in fact, it ends the case."

That involves a question of fact the truth of which is a matter of evidence, and unless it is so presented, by demurrer or otherwise, as to show the facts are before the court, the case cannot be disposed of on either demurrer or motion.

In that case a question was raised as to whether a settlement by compact had been obtained by false or mistaken representations, and the case was tried on its merits.

Scope of Judicial Notice as to Historical Facts. (Defendant's Brief, page 39).

We do not contend but that Judicial notice may be taken of Historical records but we do claim that, as a rule at least, they are only *prima facie,* and not *conclusive* evidence, and that in this case no documents cited are more than prima facie evidence on any essential feature of the case, and therefore they are not available for the purposes of defendant's motion.

Wisconsin's Claim of Sovereignty Over Disputed Territory.

At page 42 of defendant's brief we find stated a claim that by the Complaint, Michigan admits Wisconsin's sovereignty over the disputed territory from 1836 to 1907. It is not pointed out where there is such an admission. Our idea of sovereignty is a lawful exercising of *supreme* control within a certain jurisdiction. Our idea of the allegations of the complaint is that Wisconsin took possession, not in 1836 as stated, but in 1846 or thereafter under the express provision of its Statehood grant, to the effect that if its boundaries anywhere conflicted with those of the Michigan grant, Wisconsin would have to give way to Michigan's prior grant unless Michigan *ratified* the Wisconsin claimed boundary. Wisconsin's possession, therefore, was taken subject to Michigan's rights. It has never changed. It accepted the provision of its grant and took possession thereunder, and has never changed the nature of that possession of control. It may have been complete but it never was *supreme,* never was sovereign, and never was such a possession as would furnish a foundation for prescription. It never was adverse, in the true sense of the word, until, in 1907, Wisconsin refused to negotiate regarding a settlement of the boundary. It always has been subject to the same proviso which was a condition of the grant. The establishment of the Michigan line has been delayed by mistakes and misrepresentation but now that the truth is known and Michigan's rightful line can be established, Michigan asks Wisconsin to abide by the accepted terms of her grant and give up what she has so long held against the rights of Michigan. To use the language of Vattel cited by defendant and quoted above, Wisconsin

> *"is bound in conscience, and by the eternal principles of justice to make restitution of whatever accession of wealth he* (she) *has derived from the property of claimant."* (Italics are ours.)

Defendant's Heading, "The Boundary as Claimed by Wisconsin Has Been Universally Recognized."

At page 43, under this heading it is said that in order to sustain this motion defendant proposed "to submit to the court various official acts of the government of the United States, and the governments of the States of Wisconsin and Michigan, indicating on the part of the United States the construction placed upon the boundary line as originally defined by the first act of Congress, and as later more specifically defined by the Wisconsin enabling Act, and, as far as the states of Wisconsin and Michigan are concerned, indicating a recognition of such boundary and an acquiescence in the acts of Congress with reference thereto."

By the first part of the quotation *it is admitted that the complaint on its face states a cause of action,* because, *in order to win the motion,* these other things must be offered. Furthermore, all that is claimed, in the quoted statement, for the things offered is, that they *"indicate"* the intention of the parties. It is not even *claimed* that any of them are *conclusive* in their respective spheres. Therefore, under the terms of the offer, they are not admissible, and will be ineffective for the purpose of the motion.

But considering them further, we say that after the Michigan grant, Congress persistently and successively refused to construe it, never did construe it, and could not bind Michigan by any construction it might put on it. We think we have already made clear our position that Michigan has never, by any of the acts referred to, acquiesced in the line as a settled and proper boundary.

Among defendant's specific instances cited are

Recognition by the United States (brief, page 44).

There reference is made to the fact that the complaint alleges that the government of the United States included

islands on the Michigan side of the main channel of the Menominee River, in the surveys of Wisconsin, and an allegation that Michigan had been prevented from taxing them. The brief also states (page 45) that the complaint alleges that officials of the U. S. Government "have made representations to the effect that said boundary had been settled by Congress."

The above cited instances are all thoroughly disposed of and rendered ineffective by various of the above cited authorities on the question "of acquiescence," especially the Oklahoma cases. For Congress would not, by indirect action, be held to intend to do what she expressly refused to do, and the other instances are incidental occurrences liable to happen in affairs of government, held not to be binding to the extent of forfeiting the rights of the sovereign.

The allegation as to Michigan being prevented from taxation is based on the alleged fact that the lands were included in the Wisconsin surveys, and the boundary has not been established. How could Michigan tax them? Further, the allegations of misrepresentation to, and lack of knowledge on the part of Michigan, furnish a complete answer to every point of claimed acquiescence.

The bulletins *referred* on page 46 are no more than individual opinions on certain conditions, in no sense *conclusive,* on anything stated therein. They certainly could not deprive the court of the privilege of construing, or in any way affect a construction of the documents on which the opinion is supposed to be based. The question of whether or not Michigan's boundary was established depends upon documents of far greater weight than individual opinions upon the subject found in Government Bulletins.

Our discussion of the topic of "acquiescence," and citation of authorities thereunder, completely answers every

one of the citations by defendants of instances claimed to *indicate* acquiescence. Of those defendant's brief cites

United States Land Office Survey (page 47).

The fact that section lines in a Government survey were made to terminate at a conditional boundary cannot be held to imply an acquiescence which Congress had expressly refused, or an acquiescence by Michigan in a transgression of which she had no knowledge, and on which she was lulled to repose by misrepresentations.

Other Official Surveys (brief, page 48).

Under this head the claims are fully covered by the comments last preceding.

We must, however, protest the repeated claim there that the Cram survey, where the line is in dispute, is an *official* survey of the *Michigan* boundary.

Surveyor General's Maps (page 50).
Reports of Surveyor General (page 50).
Geological Surveys (page 52).
Owen's Geological Report (page 55).
Later Surveys and Reports (page 59).
Water Power Report (page 60).

The comments under each of these topics fail to disclose an instance of any action requiring criticism of the boundary by the party in charge, or any act by any party having authority to bind the state to the extent of forfeiting territory, or by anyone who had any knowledge of the transgression of Michigan's rights by the location of the line claimed to be acquiesced, etc.

"Lighthouses indicate usual channel" (page 61).

As to this topic the word *"indicate"* is good, but lighthouses are not *conclusive* evidence of the *most usual* channel. A lighthouse may serve as a guide into a harbor, or various other purposes. It is an item to be considered

with others. The Complaint did mention a Lighthouse built on an island in Port du Mort passage in 1848 as evidence of that being the most usual ship channel, but not as conclusive evidence thereof.

Defendant's brief (page 61) refers to a statutory provision in 1834 for a Federal Government light on "Pottawattomie" Island, and the brief alleges that that was what is now "Rock" Island. We have only the allegation in the brief as to the claim that the Island called "Pottawattomie" in the Congressional act is the island now called "Rock" Island. We will say, however, that we find eight maps, most of them of very early date, and some of them in the Library of Congress, wherein the Island now called Washington, is named "Pottawattomie," though with varied spellings of the name, and we did not find a map on which the island now called "Rock" was named "Pottawattomie." Washington Island is the north bank of Port du Mort passage. This feature serves to show that the issue, as to which the lighthouses are called as evidence, involves a matter as to which there may be a wide range of evidence, so that *it cannot be disposed of by motion.*

Wisconsin's Uninterrupted Sovereignty is again alleged (brief, page 63).

What we said before as to this topic applies as well here, and the questions as to the methods of protecting the rights of villagers is not one to be disposed of on motion. As a matter of law, every person who has settled within the disputed territory has had legal notice, by the records, that Wisconsin's claimed boundary is conditional. We have not, however, by the complaint proposed any interference with private titles, and nothing is said as to the moneys Wisconsin has received from sales of Michigan's public lands, or has received from taxation of Michigan lands.

But all this simply emphasizes the fact that the issues here involved are of a nature not susceptible of proper trial by motion.

> *Defendant's Topic "Geological Surveys and Reports, Wisconsin"* (brief, page 65).

There are quite extensive discussions and quotations as bearing on names of rivers, and other issues, but there is nothing under this topic that can, from its very nature, be conclusive on any essential allegation of the complaint, and this brief is already too long to further argue questions not possibly decisive of any issue under the motion.

> *Defendant's Topic "Elections show occupancy"* (page 67).

Our cited decisions show that such "incidents of government," especially under the circumstance here so often repeated, cannot result in or effect a forfeiture by the state.

The same is true of all the instances cited under the topic,

> *"Acquiescence by Michigan in exercise of jurisdiction by Wisconsin"* (brief, page 68).

Defendant's topic (page 75),

> *"In Dividing Michigan Land for Governmental Purposes the State Evidences Acquiescence."*

This topic is clearly within the range of numerous instances referred to in plaintiff's authorities under the general topic of acquiescence, especially the case of *U. S. v. Texas,* where the U. S. attached a county in the disputed territory to a judicial circuit in Texas, yet that county, after 35 years of government by Texas, was decided to be in Oklahoma.

As to the individual instances cited, we say—That on

page 75, being an act of the Legislature to divide the upper Peninsula into six counties, has nothing in it that can possibly be construed as an acquiescence in any boundary other than that claimed by Michigan.

Sec. 6 referred to mentions "the boundary line between Michigan and Wisconsin" as a part of the boundary of Delta County. That is along the Menominee River, and the quoted part certainly applies at least equally well to Michigan's as to Wisconsin's claims.

As to the further comment (page 76) on the other counties, the fact that they only included what was then known to be in Michigan and was so surveyed, is no reason for saying that Michigan waived her right to other territory not included, especially under the circumstances which kept from Michigan a knowledge of those rights. The same applies to every item under that topic.

We believe that it is made clear by the argument and admitted by defendant's counsel that the complaint, upon its face states a cause of action.

We are confident that none of the records or documents cited by defendant *conclusively* contradict any essential allegation of the complaint. Therefore, the motion should be dismissed, unless the court can see some merit, which we are unable to discern, in defendant's last assertion (brief, page 86), that:

> *"The Grant to Michigan Does Not Antedate that to Wisconsin."*

In discussing this topic counsel refer back to the Ordinance of 1787, and deal quite extensively with various transactions since that time. While we feel strongly that there is no merit to their claim we believe we can, with comparative brevity, trace the title so as to show Michigan's priority of title.

It seems unnecessary to go into the history of the acquisition of title by the United States.

Congress, in 1787, adopted

> *"An Ordinance for the Government of the Territory of the United States, Northwest of the River Ohio."*

By Article 5 of that ordinance it is provided

> "There shall be formed in said Territory not less than three, nor more than five states; and the boundaries of the states * * * shall become fixed and established as follows, to-wit." * * *

Following description of boundaries for each of three states the ordinance continued:

> "Provided, however, and it is further understood and declared, that the boundaries of these three states shall be subject so far to be altered that if Congress shall hereafter find it expedient they shall have authority to form *one or two states* in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan." (Italics are ours.)

Thus, with this clearly expressed power, Congress was privileged to form either *one* or *two* states *in* the territory north of the described line. Congress was not even required to place *all* the territory north of the said line, but could make two states out of it and leave the balance in the original three states. This seems to be the English of the ordinance, and it was the construction placed upon it by the Judiciary Committee and by Congress, at the time the Michigan-Ohio contest was decided in favor of Ohio.

There is absolutely nothing in this ordinance on which to base the statement (brief, page 93):

> "The old northwest ordinance having contemplated that the northern peninsula should form part of the State of Wisconsin, Wisconsin's right to the northern peninsula should no more be taken from Wisconsin without the consent of the people inhabiting the entire territory than could the strip given to Ohio in 1836 be taken from Michigan without consent."

This statement embodies two fatal weaknesses:

1. Neither Wisconsin nor the northern peninsula were mentioned in the Ordinance, and so the foundation is fatal.

2. The strip mentioned *was* taken from Michigan and given to Ohio.

With Congress having the authority mentioned, in 1805 Territorial government was granted to Michigan over a portion of the territory north of the line referred to, and later over that portion now in the State of Wisconsin.

Wisconsin first comes on to the Map in 1836, and then only as a territory. Previously to that she had no existence and could acquire no rights.

In 1836 Wisconsin was granted Territorial government a few weeks before Michigan was granted Statehood. It is *significant* in this connection that *their described boundaries were* exactly the same along the now disputed line. Even had there been a conflict we should claim, as in the Ohio case it was decided, that through Michigan's grant of Statehood she acquired vested rights in the territory described, while Wisconsin acquired no vested land rights through her grant of Territorial government.

However, a decision on this theory is not essential to the defeat of this motion, because, as said above, there was no conflict in the boundaries then. Wisconsin's Territorial

boundaries were exactly in accord with those of Michigan as then described and as now claimed.

It was not until 1846 that Wisconsin received, through her enabling act, the boundaries she now claims. Those boundaries were then expressly conditional and subject to Michigan's grant which was unconditional, and which antedated Wisconsin's by ten years.

We respectfully submit that the motion should be denied.

ANDREW B. DOUGHERTY,
Attorney General,
A. L. SAWYER,
Special Counsel,
Attorneys for Plaintiff.